78-572

No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES PAROLE COMMISSION, ET AL., Petitioners

v.

JOHN M. GERAGHTY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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The Solicitor General, on behalf of the United States Parole Commission, the Attorney General of the United States, and the Superintendent of the Federal Prison at Allenwood, Pennsylvania, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-73a) is reported at 579 F.2d 238. The opinion of the district court (App. D, *infra*, 77a-93a) is reported at 429 F. Supp. 737.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 74a-75a) was entered on March 9, 1978. A petition for rehearing with a suggestion for rehearing en banc was denied on May 8, 1978 (App. C, *infra*, 76a). On July 28, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including September 5, 1978, and on August 24, 1978, he further extended the time for filing a petition to and including October 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals should have dismissed the appeal in this case where the claim of the individual plaintiff concerning his eligibility for parole had been made moot by the expiration of his criminal sentence and where class action certification had been denied by the district court.

2. Whether the district court abused its discretion in failing, sua sponte, to construct and certify an appropriate subclass after the court had properly determined that the plaintiff's claims were not representative of the class that had been proposed for certification.

3. Whether the Parole Commission's parole release guidelines violate the Parole Commission and Reorganization Act by failing to give consideration to the length of a prisoner's sentence in parole release determinations.

4. Whether application of the Commission's parole release guidelines to prisoners sentenced prior to the effective date of the guidelines constitutes an unconstitutional ex post facto enhancement of criminal sentences.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

1. Article I, Section 9, clause 3 of the United States Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

2. The Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219, 18 U.S.C. 4201 *et seq.*, provides in pertinent part:

> A. 18 U.S.C. 4203:
>
> (a) The Commission * * * shall—
>
> (1) promulgate rules and regulations establishing guidelines for the powers enumerated in subsection (b) of this section and such other rules and regulations as are necessary to carry out a national parole policy and the purpose of this chapter;
>
> * * * * *
>
> (b) The Commission * * * shall have the power to—
>
> (1) grant or deny an application or recommendation to parole any eligible prisoner;
>
> (2) impose reasonable conditions on an order granting parole;
>
> (3) modify or revoke an order paroling any eligible prisoner; * * *.
>
> * * * * *

B. 18 U.S.C. 4206:

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare;

subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

* * * * *

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing * * *.

C. 18 U.S.C. 4206(d):

Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: *Provided, however,* That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.

D. 18 U.S.C. 4207:

In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) presentence investigation reports;

(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and

(5) reports of physical, mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.

3. Rule 23 of the Federal Rules of Civil Procedure provides in pertinent part:

(a) * * * One or more members of a class may sue or be sued as representative parties on behalf of all only if * * * (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class * * *.

* * * * *

(c) * * *

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subsection may be conditional, and may be altered or amended before the decision on the merits.

* * * * *

> (4) When appropriate * * * (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.
>
> * * * * *

4. The pertinent portions of the Guidelines adopted by the Parole Commission for parole release determinations, 28 C.F.R. 2.20, are reproduced in the appendix to the opinion of the court of appeals (App. A, *infra,* 67a-73a).

STATEMENT

1. Following a jury trial in the United States District Court for the Northern District of Illinois, respondent, a former Chicago police sergeant, was convicted of conspiracy to commit extortion through the use of his position as a vice squad officer, in violation of 18 U.S.C. 1951, and of making false declarations to a grand jury concerning his involvement in the extortion scheme, in violation of 18 U.S.C. 1623. On January 25, 1974, he was sentenced to concurrent terms of four years' imprisonment on the conspiracy count and one year's imprisonment on the false declarations count. The conviction was affirmed on appeal. *United States* v. *Braasch,* 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975).

Thereafter, respondent applied for and obtained a reduction in his sentence to 30 months' imprisonment pursuant to Rule 35 of the Federal Rules of Criminal Procedure (App. D, *infra,* 71a). The district court ordered this reduction on the basis of a finding that

application to respondent of the parole release Guidelines (28 C.F.R. § 2.20),[1] which had been promulgated by the Parole Commission just prior to the date on which the initial sentence was imposed, would frustrate the expectation of the sentencing court. *United States* v. *Braasch,* No. 72 CR 979 (N.D. Ill. 1975), appeal dismissed and mandamus denied, 542 F.2d 442 (7th Cir. 1976).

Respondent then applied for release on parole. On January 13, 1976, his application for parole was denied with the following explanation (App. A, *infra,* 5a):

> Your offense has been rated as very high severity. You have a salient factor score of 11. You have been in custody for a total of 4 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found that a decision at this consideration outside the guidelines does not appear warranted.

Respondent's second application for parole was denied for similar reasons on July 7, 1976, and he was continued without further consideration of parole until the expiration of his term of imprisonment (*id.* at 6a).

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[1] The background of the Parole Commission Guidelines and the parole release process are discussed in our petitions for writs of certiorari in *United States* v. *Addonizio,* No. 78-156, and *United States* v. *Edwards,* No. 78-157. Those cases present the question whether a district court may revise a lawful sentence on the ground that decisions of the Parole Commission frustrate the sentencing expectations of the sentencing court. We are sending counsel for respondent copies of our petitions in *Addonizio* and *Edwards.*

2. On September 15, 1976, respondent filed this civil action in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief (App. D, *infra,* 78a). The complaint alleged that the Parole Commission's Guidelines are invalid under the Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219, 18 U.S.C. 4201 *et seq.,* and that the Guidelines violate the ex post facto prohibition of the Constitution by authorizing the Commission to make deferred sentencing decisions (App. D, *infra,* 83a-84a). Respondent moved for certification of the case as a class action on behalf of "all federal prisoners who have been or will become eligible for release on parole" (*id.* at 82a n.9).

On November 12, 1976, the action was transferred to the Middle District of Pennsylvania, where respondent was then incarcerated (*id.* at 78a).[2] Respondent moved for summary judgment and, on February 24, 1977, the district court ruled that only issues of law were presented and the case was therefore "ripe for disposition" without an evidentiary hearing (*ibid.*).

The court first rejected respondent's request for class action certification. Class certification was found

[2] The district court in the District of Columbia construed the action as a petition for a writ of habeas corpus, and thus transferred the case to the Middle District of Pennsylvania pursuant to 28 U.S.C. 1406 and 2255. The district court for the Midd'e District of Pennsylvania noted that jurisdiction for the declaratory and injunctive relief sought by petitioner would ordinarily rest upon 28 U.S.C. 1331 and 1361. The court held, however, that since the relief sought is "in effect, a request for a ruling that petitioner is entitled to release on parole" (App. D, *infra,* 80a), habeas corpus is the exclusive remedy (*ibid.*, citing, *e.g., Preiser* v. *Rodriguez,* 411 U.S. 475 (1973)).

inappropriate because "not all members of the [proposed] class have the same interest" in challenging the validity of the parole Guidelines (*id.* at 83a). Some prisoners may find their actual or expected parole release date advanced by virtue of the Guidelines and thus would not share respondent's claim that the Guidelines improperly delay release (*ibid.*).[3] The court also rejected respondent's claim that class action certification should be granted merely "to ensure that the legal issues presented" are not made moot by the expiration of respondent's criminal sentence (*id.* at 82a).

Turning to the merits, the court held that the parole Guidelines are consistent with the provisions of the Parole Commission and Reorganization Act and that the Guidelines do not offend the Ex Post Facto Clause of the Constitution. The court noted that the Guidelines were consistent with the requirements of the Act that the parole decision be made "pursuant to guidelines promulgated by the Commission," 18 U.S.C. 4206(a), and be based on the " ' nature and circumstances of the offense *and* the history and char-

[3] The district court also held that class certification was inappropriate as to other claims that were inapplicable to all members of the class. Two issues —the classification of respondent's offense as extortion under the Guidelines and respondent's access to certain Commission files—were found by the court to relate solely to the circumstances of respondent's individual case (App. D, *infra,* 82a). Similarly, respondent's claim that the guidelines are inconsistent with the provisions of 18 U.S.C. (1970 ed.) 4208(a)(2) (now 18 U.S.C. (1976 ed.) 4205(b)(2)), under which respondent was sentenced, was found not to have applicability to those members of the proposed class who were sentenced under different statutes (*id.* at 83a).

acteristics of the prisoner' " (App. D, *infra*, 87a) (emphasis in original). Moreover, the Guidelines did not effect an ex post facto enhancement of the respondent's sentence because parole involves the administrative implementation of the sentence and "is not a form of sentencing or a modification of sentence" (id. at 85a n.10, citing *Roach* v. *Board of Pardons and Paroles*, 503 F.2d 1367, 1368 (8th Cir. 1974)).

3. a. Respondent filed a timely notice of appeal. While the appeal was pending, respondent's term of imprisonment expired and he was released from prison (App. A, *infra*, 6a). The Parole Commission then moved to dismiss the appeal as moot. The court of appeals deferred disposition of this motion pending consideration of the appeal on the merits. On March 9, 1978, over seven months after respondent had been released, the court of appeals entered its decision reversing the judgment of the district court and remanding for further proceedings.

The court acknowledged that respondent's individual claim became moot when his sentence expired. The court noted, however, that if a class action had been certified by the district court the mootness of respondent's personal claim would not bar further adjudication on behalf of the class (*id.* at 18a). See *Board of School Commissioners* v. *Jacobs*, 420 U.S. 128 (1975). Since the district court had declined to certify a class action in this case, there was neither a class nor an individual with a live controversy in the

court of appeals. But the court concluded that if a proper class *could* have been certified and the district court erred in failing to do so, the case could be remanded for class certification to preserve jurisdiction (App. A, *infra*, 28a).

With regard to the class certification question, the court of appeals agreed with the district court that the proposed class was too broad and that respondent's interests might conflict with other class members. The court held, however, that appropriate subclasses may exist and that the district court erred by not considering sua sponte the certification of such subclasses (*id.* at 32a). The court accordingly reversed the denial of class certification and remanded for the "evaluation of the proper subclasses * * *" (*ibid.*).

b. The court noted that a remand for class action certification would be an improvident dissipation of "judicial effort if the district court" had properly decided the merits of the case (*id.* at 32a-33a).[4] The court therefore stated that it was necessary and appropriate for it "to consider the merits of [respondent's] claim" at that time (*id.* at 33a). The court noted that the Commission has admitted that no

[4] The court held that the district court had jurisdiction in this case under 18 U.S.C. 4218(c) and the Administrative Procedure Act, 5 U.S.C. 701-706. Since the complaint challenges not the manner in which the Guidelines were promulgated but their substantive validity, however, 18 U.S.C. 4218(c) provides no jurisdiction. Moreover, this Court held in *Califano* v. *Sanders*, 430 U.S. 99 (1977), that the APA is not a jurisdictional statute. We do not seek certiorari to review the jurisdictional holdings of the court of appeals, however, because respondent's allegation of jurisdiction under 28 U.S.C. 1331 is sufficient in this case. See *Andrus* v. *Charlestone Stone Products Co.*, No. 77-380, decided May 31, 1978, slip op. 3-4 n.6.

weight is given to the length of a prisoner's sentence either in determining a prisoner's customary release date under the Guidelines or in making individual parole determinations (*id.* at 36a).[5] The court concluded that the length of sentence was intended to be a relevant factor in the parole process under the Parole Commission and Reform Act, and that parole procedures that fail to take sentence length into account in exercising paroling discretion are inconsistent with that Act.[6]

The court further held that if the Guidelines are applied to prisoners sentenced before their effective date, and if they deprive any prisoner "of the possibility of a substantially more lenient punishment" that would result from the previously applicable parole procedures (*id.* at 58a), then the Guidelines, as applied, would violate the prohibition of the Ex Post Facto Clause (*id.* at 64a-65a). The court of appeals directed the district court to determine on remand whether the facts reveal that the Commission's Guidelines fail to give consideration to sentence length and result in enhanced punishment for prisoners that were sentenced prior to the Guidelines' effective date (*id.* at 65a, 66a).

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[5] Of course, the minimum and maximum sentence lengths established by the sentencing court (18 U.S.C. 4205(b)(1), (2)) determine the period during which the Commission has paroling discretion. See also 18 U.S.C. 4205(a).

[6] The court also suggested that if the Act permits the Commission to disregard sentence length in the parole decisionmaking process, the statute may unconstitutionally infringe the judicial sentencing function (App. A, *infra*, 46a-50a).

REASONS FOR GRANTING THE PETITION

The issues presented by this case are of substantial significance to class action litigation and to the proper administration of the federal parole system. The holding of the court of appeals that this case is not moot, even though there is no longer an individual litigant with a live controversy and even though no class action had been certified prior to the mooting of respondent's claims, departs from decisions of this Court and is in direct conflict with decisions in other circuits. Furthermore, the conclusion that the district court abused its discretion by failing to consider sua sponte whether a subclass of plaintiffs could be certified in this case imposes unreasonable duties on the trial court and is substantially at variance with accepted principles of class action litigation.

The court of appeals itself recognized (App. A, *infra,* 43a n.91, 61a-62a) that its holding that the Parole Commission and Reorganization Act and the Ex Post Facto Clause require the Commission to give consideration to sentence length in formulation of its parole release Guidelines and in making individual parole release determinations is in conflict with the decisions of other courts of appeals. The uncertainty created for federal prisoners by these disparate decisions, and the interference that the decision in this case creates for the effective management of the federal parole system, is manifest.

The decision of the court of appeals thus raise issues of substantial importance that should be resolved by this Court.

1. This Court has, on several occasions, elaborated the extent to which jurisdiction may continue for class action litigation when the claims of all individual litigants have become moot. In these decisions, the Court has held that the case as a whole becomes moot upon the termination of the claims of the named litigants "unless [the case] was duly certified as a class action" while the controversy remained live. *Board of School Commissioners* v. *Jacobs,* 420 U.S. 128, 129 (1975); *Sosna* v. *Iowa,* 419 U.S. 393, 402 (1975). See *Kremens* v. *Bartley,* 431 U.S. 119, 132-133 (1977).[7] Consistent with "firmly established requirements" under Article III of the Constitution, there must be a "named plaintiff who has * * * a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23 * * *." *Sosna* v. *Iowa, supra,* 419 U.S. at 402.[8] Absent a live controversy based on the claim of either a named litigant or a "duly certified" class, the case lacks the concreteness and adversarial nature that is requisite to the maintenance of jurisdiction by federal courts. *Ibid.;* see

[7] Even where a class has been "duly certified," the case becomes moot upon the termination of the claims of the named litigants if the issue raised in the case is not " 'capable of repetition, yet evading review,' " *Kremens* v. *Bartley, supra,* 431 U.S. at 133; *Board of School Commissioners* v. *Jacobs, supra,* 420 U.S. at 129, or if the class that was certified by the district court requires alteration due to subsequent developments in the case, *Kremens* v. *Bartley, supra,* 431 U.S. at 132.

[8] "A litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court." 419 U.S. at 403, citing, *e.g., Bailey* v. *Patterson,* 369 U.S. 31 (1962).

also 419 U.S. at 412 (White, J., dissenting); *Pasadena City Board of Education* v. *Spangler,* 427 U.S. 424, 430 (1976); *Franks* v. *Bowman Transportation Co.,* 424 U.S. 747, 755 (1976); *O'Shea* v. *Littleton,* 414 U.S. 488, 493 (1974).

In applying the principles of these decisions, the courts of appeals have ordinarily held that "in the absence of a properly certified class, the representative plaintiff whose claim has become moot is himself without a litigable grievance, and the person or persons on whose behalf he seeks to continue the litigation has or have not yet achieved jurisprudential existence. There being no adversary necessary for the creation of the constitutionally required case or controversy, jurisdiction is lacking." *Vun Cannon* v. *Breed,* 565 F.2d 1096, 1099 (9th Cir. 1977) (citation omitted). See *Inmates* v. *Owens,* 561 F.2d 560 (4th Cir. 1977); *Lasky* v. *Quinlan,* 558 F.2d 1133 (2d Cir. 1977); *Kuahula* v. *Employers Insurance of Wausau,* 557 F.2d 1334 (9th Cir. 1977); *Boyd* v. *Justices of Special Term,* 546 F.2d 526 (2d Cir. 1976); *Napier* v. *Gertrude,* 542 F.2d 825 (10th Cir. 1976), cert. denied, 429 U.S. 1049 (1977).

The court of appeals held in this case, however, that if the class certification was improperly denied by the district court, the case is not moot even though the claim of the named litigant has expired (App. A, *infra,* 20a-21a).[9] This decision is in direct conflict with the

[9] The Fifth Circuit suggested in *dicta* in *Satterwhite* v. *City of Greenville,* No. 75-3377 (Aug. 23, 1978) (en banc), slip op. 6540-6541, that the court of appeals may retain jurisdiction in some circumstances where the denial of class

decision of the Seventh Circuit in *Winokur* v. *Bell Federal Savings & Loan Association,* 560 F.2d 271 (1977), cert. denied, No. 77-1020 (March 20, 1978). In *Winokur,* the named plaintiffs, whose individual claims were moot, sought to appeal the district court's denial of class certification. The court of appeals held that since no live controversy then existed, the court could not exercise jurisdiction "even to reverse the class action determination and thus instill a live controversy into the action." 560 F.2d at 276.

The court of appeals suggested, however, that its contrary decision in this case [10] was consistent with a narrow exception to the mootness doctrine recognized by this Court in *Sosna* v. *Iowa, supra,* and applied in *Gerstein* v. *Pugh,* 420 U.S. 103 (1975). We submit that this conclusion misconstrues the pertinent decisions of this Court. In *Sosna,* the Court held that the case becomes moot if the claims of the named plaintiffs expire before class certification. 419 U.S. at 402. The Court stated, however, that "[t]here may be cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion." *Id.* at 402 n.11. Where a claim is "by nature temporary," and it is unlikely that any individual claim would survive "long enough for a district judge to certify the class," *Gerstein* v. *Pugh, supra,* 420 U.S. at 110 n.11, the claim is one "capable of repetition, yet evading review," and thus falls within the conventional exception to the mootness doctrine. *Ibid.* In these circumstances, the Court observed in *Sosna* that the class certification may be said to " 'relate back' to the filing of the complaint" for purposes of determining jurisdiction. 419 U.S. at 402 n.11.

The "relation back" exception has been applied only in circumstances where the controversy is inherently temporary in nature and capable of evading judicial review even at the trial court level. See *Gerstein* v. *Pugh, supra* (challenge to legality of pretrial detention); *Ahrens* v. *Thomas,* 570 F.2d 286, 288-289 (8th Cir. 1978) (same); *Williams* v. *Wohlgemuth,* 540 F.2d 163, 167 (3d Cir. 1976) (eligibility for emergency assistance relief). See also *Swisher* v. *Brady,* No. 77-653 (June 28, 1978), slip op. 8-9 n.11. This case fails to come within this exception to the mootness doctrine because it does not involve a controversy "so transitory that mootness inevitably intervenes before the District Court can 'reasonably be expected to rule on a certification motion.' " *Boyd* v. *Justices of Special Term, supra,* 546 F.2d at 527 n.2. See *Swisher* v. *Brady, supra; Vun Cannon* v. *Breed, supra,* 565 F.2d at 1100-1101; *Banks* v. *Multi-Family*

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certification was improper even though the individual claims of the named litigants had expired. In the same decision, however, the court noted that under *Sosna* v. *Iowa, supra,* "[i]t does not suffice [for jurisdiction] that such a certification *would have been* accorded but for some error * * *." Slip op. 6539 (emphasis in original).

[10] The court recognized that its decision was in conflict with decisions in other circuits. See App. A, *infra,* 25a n.49.

Management, Inc., 554 F.2d 127, 128 (4th Cir. 1977); *Napier* v. *Gertrude, supra,* 542 F.2d at 828.[11] There is no basis for concluding here that persons imprisoned in federal penitentiaries are not likely to be in "custody long enough for a district judge to certify a class." *Gerstein* v. *Pugh, supra,* 420 U.S. at 111, n.11.[12] Indeed, almost a full year elapsed between respondent's second denial of parole and his release from custody, and the district court thus had ample time to rule—and it did rule—on respondent's certification request. Moreover, as the court of appeals conceded (App. A, *infra,* 26a), "some prisoners will retain their grievances long enough to achieve appellate review."

The court of appeals has misapplied the decisions of this Court and created a conflict with other circuits. Review of the decision in this case is warranted

[11] The court below erred in relying (App. A, *infra,* 23a) upon *Baxter* v. *Palmigiano,* 425 U.S. 308 (1976), and *United Airlines* v. *McDonald,* 432 U.S. 385 (1977). In *Baxter,* the Court refused to treat the case as a class action where the certification requirement of Rule 23, Fed. R. Civ. P., had not been complied with and the named plaintiffs' claims had become moot upon their release from prison. Instead, the Court held that another prisoner who had intervened as a named plaintiff could raise the claims in his own behalf. 425 U.S. at 310 n.1. In *McDonald,* no question of mootness was involved. The sole question before the Court was whether a post-judgment application for intervention was timely. 432 U.S. at 391.

[12] Nor, as the court below suggested (App. A, *infra,* 27a), do the restrictions on interlocutory appeals from class certification denials (see *Coopers & Lybrand* v. *Livesay,* No. 76-1836 (June 21, 1978); *Gardner* v. *Westinghouse,* No. 77-650 (June 21, 1978) provide a proper basis for applying the "relation back" exception. While this may afford a basis in policy for granting review if the question is simply one of the exercise of discretion by the appellate court, it cannot confer jurisdiction where there is no cognizable case or controversy. See *Sosna* v. *Iowa, supra,* 419 U.S. at 401 n.9.

to settle this important question of federal jurisdiction.

2. While agreeing with the district court that the proposed class—consisting of all federal prisoners eligible for parole—was too broad, the court of appeals ruled that the district court abused its discretion under Rule 23 of the Federal Rules of Civil Procedure by failing, sua sponte, to consider the creation of subclasses in this case.[13] This holding creates serious difficulties for trial management of class action litigation and conflicts with principles concerning such litigation accepted by other courts of appeals.

The district court has authority under Rule 23(c)(4) of the Federal Rules of Civil Procedure to alleviate difficulties encountered or anticipated in the management of a class action by dividing the class into appropriate subclasses. The creation of such subclasses rests in the discretion of the trial court. *Monarch Asphalt Sales Co.* v. *Wilshire Oil Co.,* 511 F.2d 1073, 1077 (10th Cir. 1975). No court has held, prior to the decision of the court of appeals in this case, that where the proposed class is overbroad, the district court abuses its discretion by failing to consider and construct subclasses even though the plaintiff has not requested it to do so.[14]

[13] This ruling was crucial to the court's disposition of the case, since the court's "relation back" theory could justify revivification of an otherwise moot case only if the original refusal to certify a class action was erroneous.

[14] The court of appeals' reliance (App. A, *infra,* 30a-31a) upon *Samuel* v. *University of Pittsburgh,* 538 F.2d 991 (3d Cir. 1976), is misplaced. In that case it was held that the district court had erred in concluding that a class

As a general principle, it is the plaintiff's burden to establish the propriety of his request for class action certification. See, *e.g.*, *Smith* v. *Merchants & Farmers Bank of West Helena*, 574 F.2d 982, 983 (8th Cir. 1978); *Windham* v. *American Brands, Inc.*, 565 F.2d 59, 64 n.6 (4th Cir. 1977); *Doctor* v. *Seaboard Coast Line R.R.*, 540 F.2d 699, 706 (4th Cir. 1976); *Davis* v. *Romney*, 490 F.2d 1360 (3d Cir. 1974). See also 3B J. Moore, *Federal Practice* ¶ 23.02-2, at 23-96 (2d ed. 1977); 7A C. Wright & A. Miller, *Federal Practice and Procedures* § 1798, at 244-245 (1972). If the proposed class is overbroad or otherwise inappropriate, the plaintiff must retain the responsibility of demonstrating the suitability of proceeding with subclasses. "Counsel for the class have the primary responsibility for pressing a class action claim. They do not satisfy their responsibilities by simply affixing the class action label to a suit and depositing it with the clerk." *Satterwhite* v. *City of Greenville*, *supra*, slip op. 6544.

It is thus inconsistent with ordinary principles of class action litigation to require trial judges to pro-

action was unmanageable and that the district court's decertification of the class was therefore improper. The court added, in *dicta*, that even if the class action were unmanageable "the possible usefulness of subclasses" to avoid management problems should have been considered. 438 F.2d at 996. The decision does little more than point out the potential benefits of using subclasses to alleviate management difficulties; it did not adopt a rule placing an obligation on the district court to create appropriate subclasses on behalf of plaintiffs who have not sought subclass certification.

pose new theories or definitions of a class where the plaintiff has failed, whether due to lack of interest or otherwise, to suggest such an alternative. Moreover, placing the burden on the court, rather than on counsel, to propose subclass certification is contrary to the accepted principle that grounds for reversal may not ordinarily be urged on appeal that were available, but not raised, in the district court. See, *e.g.*, *D. H. Overmyer Co.* v. *Loflin*, 440 F.2d 1213, 1215 (5th Cir. 1971); *Autrey* v. *Williams and Dunlap*, 343 F.2d 730, 750 (5th Cir. 1965); *Continental Can Co.* v. *Horton*, 250 F.2d 637, 645 (8th Cir. 1957).[15]

The rule adopted by the court of appeals will create unmanageable difficulties for the district courts. It will require trial courts to apply their limited resources in an effort to construct class certification theories that even plaintiff's counsel, possessing an adversarial interest in the litigation, has not imagined or thought worth raising. By placing this novel burden of advocacy on the trial court, the decision releases counsel from their ordinary and appropriate responsibility. It exposes the court to reversal and a renewal of proceedings with regard to matters that were not contested before it, and thus discourages

[15] There is nothing to suggest that an order remanding for consideration of subclass certification would be necessary to correct manifest injustice, see *Hormel* v. *Helvering*, 312 U.S. 552, 556-557 (1941), in a case where the plaintiff did not request subclass certification until the case reached the court of appeals. If the case is dismissed by the court of appeals and other members of the proposed subclass in fact desire to litigate similar claims, they may initiate a new lawsuit in the district court.

efficient use of judicial resources by class action litigants.[16]

3. The court of appeals ruled that the Parole Commission and Reorganization Act requires the Commission, in formulating guidelines for the exercise of paroling discretion and in making parole decisions in individual cases, to take into account the sentence imposed by the court. This ruling, if correct, would require a wholesale revision of the present approach of the Commission to parole decisions—an approach approved by other courts of appeals and, we believe, specifically authorized by Congress in the Act—under which no weight is ordinarily given to sentence length in exercising paroling discretion. Although, for the reasons stated above, it is our view that the court

[16] We note that the mandate of the court of appeals was issued to the district court on May 16, 1978, and that the Commission did not seek to stay issuance of the mandate while authorization for filing a petition for certiorari was being obtained. Following the decision to seek review in this Court, however, the Commission immediately moved in the district court, on August 18, 1978, for a stay of any further proceedings pending disposition of its petition for certiorari in this Court. The district court reserved decision on that motion. Thereafter, on August 22, 1978, the district court conducted an evidentiary hearing on the class certification issue. At the conclusion of that hearing, however, the court reserved decision on this issue.

There is no reason to delay decision on the issues presented here pending the outcome of the district court proceedings. This Court has frequently recognized that issuance of the mandate by the court of appeals and action taken in compliance with the terms of the mandate do not defeat the jurisdiction of this Court. *E.g., Mancusi* v. *Stubbs*, 408 U.S. 204, 205-207 (1972); *Aetna Casualty Co.* v. *Flowers*, 330 U.S. 464, 467 (1947). A timely petition for a writ of certiorari operates to suspend the finality of any judgment until this Court disposes of the case. If this Court grants certiorari and reverses the judgment of the court of appeals, that action nullifies the mandate of the court of appeals and, by the same token, any order of the district court that may be entered pursuant thereto.

lacked jurisdiction to reach the merits in this case, we deem it important to demonstrate the incorrectness of the court's decision and the significant adverse consequences it entails for the effective management of the federal parole system.

a. We note preliminarily that the court of appeals did not itself hold the present parole system invalid. Rather, it directed the district court to determine on remand whether the evidence supports the conclusion that the Guidelines give no weight to sentence length. The Commission admits, however, that no weight is given under the Guidelines to the length of the sentence, and it has acknowledged this in both courts below (App. A, *infra*, 36a). Thus, assuming the court of appeals had jurisdiction to decide the matter, its decision effectively determines the issue of the validity of the Guidelines, and the remand hearing on the merits would be a mere formality.

b. The sentence imposed upon a convicted offender defines the period during which he is eligible for release on parole. Thus, the sentence, in conjunction with statutory provisions for "good time" credits, sets the minimum required and maximum permissible period of confinement.[17] The statute also provides that

[17] Section 4205 establishes the minimum period of confinement before a convict may be released on parole, which is one-third of the total sentence (or ten years for any offender sentenced to a term in excess of 30 years), except that the sentencing court may provide either for immediate parole eligibility (Section 4205(b)(2)) or for parole eligibility after service of some specified period less than one-third of the sentence (Section 4205(b)(1)).

prisoners sentenced to a term of five years or longer are presumptively entitled to parole release after they have served two-thirds of their sentence (18 U.S.C. 4206(d)).[18]

During the period between the prisoner's first eligibility for parole and the two-thirds point, the Commission has substantial discretion to decide whether to grant release on parole, including the power to decline to give weight to the sentence imposed. Under 18 U.S.C. (1970 ed.) 4203, which was in effect when respondent was sentenced, the Commission was entitled to consider any aspect of the public welfare in making its parole decision. Under the present statute, the Commission must consider whether release "would * * * depreciate the seriousness of [the] offense or promote disrespect for the law * * * [or] jeopardize the public welfare * * *" (18 U.S.C. 4206(a)).

Until 1970 the Commission exercised its discretion on a case-by-case basis, using no published criteria or guidelines. In response to widespread criticism that this led to arbitrary and erratic decisions, the Commission began to experiment with structured release criteria that were predicated upon the nature of the

[18] Section 4206(d) permits parole to be withheld beyond the two-thirds point only where there is a history of frequent or serious violation of institutional rules or where the Commission concludes that there is a reasonable probability that the prisoner, if released, would commit new criminal offenses.

offense and the offender's personal characteristics.[19] These offense and offender characteristics were assigned weights and converted into numerical values; after computing the numerical values, the prisoner and the Parole Commission could turn to a table to find a range (*e.g.*, 36 to 45 months) that most (but not all) of the persons with similar characteristics could expect to serve, with good institutional behavior, before release. The program was commenced in 1970, before respondent was sentenced, and it was revised in November 1973 (38 Fed. Reg. 31942). The present guidelines, codified at 28 C.F.R. 2.20, are the culmination of the Commission's "effort to introduce more consistency in parole decision-making" (*United States* v. *DiRusso*, 535 F.2d 673, 674 (1st Cir. 1976)).

The Parole Commission and Reorganization Act, enacted in 1976, did not repudiate the Commission's choice to exercise its discretion pursuant to parole release guidelines. To the contrary, the Act specifically directs the Commission to make its parole determinations "pursuant to guidelines promulgated by the Commission * * *." 18 U.S.C. 4206(a); see 18 U.S.C. 4203(a)(1), (b). While the Act directs the Commission to consider the seriousness of the offense, the need to preserve respect for the law, and the public welfare in making its parole determinations, 18 U.S.C.

[19] For a history of this development and a description of the system, see D. Stanley, *Prisoners Among Us: The Problem of Parole* (1976); Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810 (1975).

4206(a),[20] the Act makes no mention of any obligation of the Commission to give consideration to the length of the prisoner's sentence in the exercise of its discretion.[21]

Congress was aware of the Commission's use of parole guidelines based on offense severity and offender characteristics when it enacted the Parole Commission and Reorganization Act. The legislative history of the Act reflects approval of the Commission's use of these guidelines to reduce the effects of sentencing disparity. The Conference Committee noted that

> parole has the practical effect of balancing differences in sentencing policies and practices between judges and courts in a system that is as wide and diverse as the Federal criminal justice system. In performing this function, the parole authority must have in mind some notion of the appropriate range of time for an offense which will satisfy the legitimate needs of society to hold

[20] The Commission is also to consider the parole recommendation of the sentencing judge "made at the time of sentencing," 18 U.S.C. 4207(4), and other specified reports and recommendations. 18 U.S.C. 4207.

[21] In the original version of the Act approved by the House of Representatives (H.R. 5727), the statute provided that a prisoner was to be released after serving one-third of his sentence unless the Commission established that the prisoner was not acceptable for release on the basis of specified criteria. H.R. Rep. No. 94-184, 94th Cong., 1st Sess. 4-5 (1975). That provision was eliminated in the version of the Act that was adopted by the Senate. The Senate amendment, which was adopted in Conference, provided that a prisoner was to be eligible for release on parole after one-third of his sentence had been served but that, before granting parole, the Commission must determine that the prisoner was a proper candidate for release. S. Rep. No. 94-369, 94th Cong., 1st Sess. 22, 23 (1975); see note 22, *infra*. The presumptive entitlement to release that the House proposed at the completion of one-third of the sentence was provided instead at the two-thirds point under the Act. 18 U.S.C. 4206(d) (limited to prisoners serving a sentence of five years or more).

> the offender accountable for his own acts. * * * The use of guidelines * * * will sharpen this process and improve the likelihood of good decisions.

S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 19 (1976); H.R. Conf. Rep. No. 94-838, 94th Cong., 2d Sess. 19 (1976). See also S. Rep. No. 94-369, 94th Cong., 1st Sess. 16 (1975). More specifically, the Conference Report states that

> [t]he organization of parole decision-making along regional lines, the use of hearing examiners to prepare recommendations for action, and, *most importantly, the promulgation of guidelines to make parole less disparate and more understandable has met with such success that this legislation incorporates the system into the statute*, removes doubt as to the legality of changes implemented by administrative reorganization, and makes the improvements permanent.

S. Conf. Rep. No. 94-648, *supra* at 20 (emphasis supplied); H.R. Conf. Rep. No. 94-838, *supra*, at 20. The conferees thus anticipated that parole release decisions would be based on the Guidelines and that deviations from the Guidelines would be warranted only upon a determination that there is "good cause for so doing." 18 U.S.C. 4206(c); see 122 Cong. Rec. S2572 (daily ed. March 2, 1976) (Sen. Burdick); S. Conf. Rep. No. 94-648, *supra*, at 23, 27; H.R. Conf. Rep. No. 94-838, *supra*, at 23, 27.[22]

[22] As Congressman Kastenmeier explained, in describing the differences between the House and Senate versions of the legislation and the compromises reached by the conference committee (122 Cong. Rec. H1500 (daily ed. March 3, 1976)):

> The primary disagreement between the House and Senate was the question of how much discretion should be retained by the Commission in

The holding of the court of appeals in this case is thus based on an incorrect understanding of the objectives of Congress in enacting the Parole Commission and Reorganization Act. The Commission is not usurping the judicial sentencing function by exercising its separate parole authority [23] in the precise manner that Congress intended. Two other courts of appeals have reviewed the same legislative history and concluded that the Commission's Guidelines are consistent with the Act. *Garcia* v. *United States Board of Parole,* 557 F.2d 100, 107 (7th Cir. 1977); *Banks* v. *United States,* 553 F.2d 37, 40 (8th Cir. 1977). The conflict created by the decision in this case has resulted in uncertainty for prisoners as to their parole opportunities and impeded the normal functioning of the Commission's decisionmaking process.

c. The court of appeals also erred in concluding that the parole Guidelines may violate the Ex Post Facto Clause of the Constitution (App. A, *infra,* 55a-65a).[24] The court stated that the Guidelines appear

making release determinations once a prisoner is in fact eligible for parole. This was resolved by increasing the role of the parole determination guidelines and by granting the Commission the option of acting outside the guidelines in extraordinary cases.

[23] See *United States* v. *Grayson,* No. 76-1572 (June 26, 1978), slip op. 6.

[24] It should be noted that respondent was sentenced on January 25, 1974, two months after the guidelines were formally promulgated (38 Fed. Reg. 31942 (November 19, 1973)), and that respondent's sentence was reduced in October 1975 when the sentencing court became aware of the guidelines (see pp. 6-7, *supra*). In these circumstances, even if a class action had been certified by the district court, it is questionable whether respondent would be a suitable representative for any claim based upon the alleged ex post facto effect of the Guidelines.

to narrow the broad discretion that the Commission had previously exercised in its parole decisions and that, by unduly structuring the parole process, the Guidelines deprive prisoners "of the possibility of a substantially more lenient punishment" (*id.* at 58a). The court reasoned that the "possibility of a substantially more lenient punishment" was a part of each prisoner's sentence prior to promulgation of the Guidelines,[25] and that depriving prisoners of this "possibility" would constitute increased punishment in violation of the Ex Post Facto Clause (*id.* at 58a-65a). While it appeared to the court that the Guidelines act as an "unyielding conduit" to impose substantial limitations on the Commission's discretion to grant parole, and that application of the Guidelines to previously sentenced prisoners therefore violates the Ex Post Facto Clause, the court directed the district to hold a factual hearing on the issue on remand.[26]

There is no justification for a factual hearing on remand. By providing a range of months within which release may ordinarily be expected, the Guidelines do

[25] The court of appeals relied, in part, on *Warden* v. *Marrero,* 417 U.S. 653 (1974), for this aspect of its analysis. In *Warden,* the Court held that a prisoner sentenced under a statute barring parole does not become eligible for parole when the prohibition against parole is repealed by subsequent legislation. The Court concluded that parole ineligibility was part of the sentence imposed under the original statute. *Id.* at 658-664. This precedent does not support the use to which it was put by the court of appeals.

[26] The court suggested that the Guidelines might be constitutional "if in practice the parole authorities found good cause to deviate from the guidelines in 60% of the cases * * *" (*id.* at 64a). The court noted, however, that the Parole Commission admitted that parole was granted prior to the customary release date under the Guidelines in only 8.7% of the cases (*ibid.*).

not require the Commission to follow any fixed formula in reaching dispositions in particular cases. The Commission remains free to assign a severity rating different from that listed in the guidelines where mitigating or aggravating circumstances are present. 28 C.F.R. 2.20(d). The Commission may also make decisions outside the guidelines where the circumstances warrant. *Id.* at 2.20(c). To the extent there was a "possibility of a substantially more lenient punishment" prior to adoption of the Guidelines, that possibility remains. More fundamentally, however, pursuant to the traditional allocation of responsibilities between the sentencing judge and the parole authorities (see *United States* v. *Grayson,* No. 76-1572 (June 26, 1978), slip op. 6), parole officials have always retained the broadest discretion over parole release determinations (see pp. 23-28, *supra*). The Guidelines do no more than provide structure to that continuing exercise of discretion and thus do not alter any justified expectation of parole eligibility.

Other courts of appeals have rejected the claim that the Guidelines constitute an ex post facto law. In *Ruip* v. *United States,* 555 F.2d 1331 (6th Cir. 1977), the court held that application of the Guidelines to previously sentenced prisoners is permissible because the Parole Commission has been given "absolute discretion" in parole matters and the Guidelines merely "assist [the Commission] in attaining a more uniform exercise of its discretion" (*id.* at 1335, 1336). Similarly, in *Shepard* v. *Taylor,* 556 F.2d 648 (2d Cir.

1977), the Second Circuit stated that "the guidelines do not constitute impermissible *ex post facto* laws when applied to an adult offender since, in such an instance, they merely clarify the exercise of administrative discretion without altering any existing considerations for parole release." *Id.* at 654. The decision in this case has thus created a conflict among the circuits and placed in doubt the validity of Guidelines that are central to the parole process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1978

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1679 and 77-1858

JOHN M. GERAGHTY, indiv. and on
behalf of a class,

v.

UNITED STATES PAROLE COMMISSION
and
ATTORNEY GENERAL OF UNITED STATES
and
SUPERINTENDENT FEDERAL PRISON
Allenwood, Pa.

John M. Geraghty, appellant in 77-1679
Eliezer Becher, appellant in 77-1858

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

C.A. No. 76-1467

Argued October 21, 1977
Before: ADAMS and GARTH, *Circuit Judges*, and
LACEY, *District Judge.**

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* United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT
(Filed March 9, 1978)

ADAMS, *Circuit Judge.*

This appeal, in an action challenging the parole guidelines promulgated by the United States Parole Commission, raises two issues of broad import. First, it requires us to examine the conditions under which a class action, which the trial court refused to certify, may be submitted to an appellate court despite the fact that the named plaintiff no longer retains a "live" personal grievance. Second, it presents the question of the validity, under both statutory and constitutional standards, of the guidelines that govern federal grants of parole.

I. THE FACTS

A. *The Guidelines*

Beginning in 1910, certain prisoners incarcerated for conviction of federal crimes have been eligible for release on parole.[1] To facilitate such arrangement, the United States, in 1948, established a Parole Board (the Board), under the Department of Justice, to rule on applications for parole. While originally the Board's decisions were not based on formally articulated policies and procedures, in 1973 the Board published a series of regulations governing parole deci-

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[1] The Act of June 25, 1910, ch. 387 § 1, 36 Stat. 319, was the first legislation that established authority to grant parole to federal prisoners.

sions, including "guidelines" to establish "customary release dates" for given classes of offenders.[2]

In 1976, Congress enacted the Parole Commission and Reorganization Act (the PCRA).[3] The PCRA reconstituted the Parole Board as the United States Parole Commission (the Commission), an independent federal agency. Under the PCRA, the Commission is responsible for promulgating "guidelines" for the exercise of statutory discretion concerning the granting of parole.[4] In making a decision regarding an individual inmate, the Commission is directed to examine "the nature and circumstances of the offense and the history and characteristics of the prisoner," and then to determine whether release would "depreciate the seriousness of his offense," "promote disrespect for the law" or "jeopardize the public welfare." Inmates are to be released "pursuant to the guidelines" if the determination by the Commission, in light of the statutory criteria, is favorable.[5]

The "guidelines" currently utilized are substantially the same ones that channeled the Board's discretion before the enactment of the PCRA. Under them, offenses are assigned a "severity" rating, and

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[2] 38 Fed. Reg. 26652-57 (Sept. 24, 1973). For an extensive analysis of the guidelines and associated issues of policy and law, *see* Note, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810 (1975) [hereinafter cited as Yale Note].

[3] 18 U.S.C. § 4201-4218 (1976).

[4] 18 U.S.C. § 4203(a) (1976).

[5] 18 U.S.C. § 4206 (1976).

are placed into one of six categories, ranging from "low" to "greatest." Each inmate is assigned a "parole prognosis score" of between 0 and 11, using "salient factors" such as the age at which the inmate was first convicted, his employment background, his drug history, his previous parole revocations, and his prior convictions. The "guidelines" include a grid in which a combination of salient factor score and offense severity rating identifies a "customary" time span to be served.[6]

B. *The Named Plaintiff*

John M. Geraghty, a Chicago policeman, was convicted in 1973 of conspiracy to commit extortion and

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[6] The current guidelines, codified at 28 C.F.R. § 2.20, are reproduced as Appendix I, *infra*. Previous cases in this Circuit concerning the guidelines have dealt primarily with the availability of 28 U.S.C. § 2255 as a vehicle for trial judges to resentence prisoners where the expectations of the sentencing judge have been frustrated by the applications of the guidelines. *Addonizio v. United States*, Nos. 77-1542, 77-1621, 77-2373 (3d Cir. Feb. 16, 1978); *United States v. Somers*, 552 F.2d 108 (3d Cir. 1977); *United States v. Salerno*, 538 F.2d 1005 (3d Cir.) *aff'd per curiam sur petition for rehearing* 542 F.2d 628 (3d Cir. 1976); *cf. United States v. Solly*, 559 F.2d 230 (3d Cir. 1977) (reversing denial of Rule 35 motion where parole guidelines operated to frustrate sentencing judge's expectation). The availability of § 2255 has been a subject of some disagreement among the circuits. *Compare e.g. United States v. Kent*, 563 F.2d 239 (5th Cir. 1977); *United States v. McBride*, 560 F.2d 7 (1st Cir. 1977); *Andrino v. United States Board of Parole*, 550 F.2d 519 (9th Cir. 1977) *with e.g. Kortness v. United States*, 514 F.2d 167 (8th Cir. 1975); *United States v. Slutsky*, 514 F.2d 1222 (2d Cir. 1975).

Recently, in *United States v. Musto*, No. 77-1239 (slip op. 1978), this Court held that § 2255 was unavailable as a jurisdictional base for an attempt by one already confined to alter a sentence imposed by a judge who had knowledge of the parole guidelines. But *Musto* would not appear to alter the holding in *Zannino v. Arnold*, 531 F.2d 687, 690 (3d Cir. 1976), that judicial review of a parole board decision is available under 28 U.S.C. 2241 "to insure that the Board has followed criteria appropriate, rational and consistent with the statute and that its decision is not arbitrary and capricious nor based on impermissible considerations." *See id.* at 689 n.5.

of making false declarations to the grand jury. The extortion charge was based on Geraghty's use of his position as a Chicago Vice Squad Sergeant to shake down local dispensers of alcoholic beverages; the false declaration charge arose out of denials of involvement in this activity. After attempts to overturn his sentence proved unsuccessful,[7] Geraghty applied for parole. Despite the good institutional adjustment one might expect from a former policeman, parole was denied Geraghty on the ground that:

> Your offense has been rated as very high severity. You have a salient factor score of 11. You have been in custody for a total of 4 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found that a decision at this consideration outside the guidelines does not appear warranted.

As finally amended, Geraghty's sentence was 30 months. Thus, under the "customary release date," he

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[7] Geraghty's conviction was affirmed in *United States v. Braasch*, 505 F.2d 139 (7th Cir. 1974) *cert. denied sub nom. Geraghy v. United States*, 421 U.S. 910 (1975). His sentence was subsequently reduced by the trial court from 4 years to 30 months, under Rule 35, F.R. Crim. P. The reduction was based on a finding that the guidelines would cause Geraghty to be imprisoned substantially longer than the district court intended. *United States v. Braasch*, No. 72 C.R. 979 (N.D. Ill. Oct. 1, 1975), *mandamus denied* 542 F.2d 442 (7th Cir. 1976).

could not be granted parole before the end of his sentence as reduced by "good time" credits.

Geraghty applied for parole a second time, but that request was also denied in June, 1976. The second statement of reasons given by the Commission was substantially identical with the first.[8] Asserting that he was being denied parole by reason of a mechanical application of the guidelines, Geraghty then brought the present suit as a class action challenging the validity of the guidelines, and questioning the procedures by which the guidelines were applied to his case.[9]

Judge R. Dixon Herman, of the District Court for the Middle District of Pennsylvania, declined to certify the class action, and granted summary judgment against Geraghty on all of the claims he had asserted. After an appeal from both rulings was docketed, but before oral argument was heard by us, Geraghty's sentence expired and he was released.

II. Jurisdictional Problems

Before proceeding to the merits of Geraghty's contentions, we must consider a number of significant procedural objections.

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[8] A verbatim reproduction of this statement was upheld by a panel of this Circuit as a sufficient articulation of reasons to satisfy the demands of due process. *Hill v. Atty. Gen.*, 550 F.2d 901 (1977) *accord Garcia v. United States*, 557 F.2d 100 (7th Cir. 1977).

[9] Although the action was originally filed in the District Court for the District of Columbia, the matter was transferred to the Middle District of Pennsylvania, where Geraghty was then confined. *Geraghty v. United States Parole Commission*, Civ. No. 76-1729 (D. D.C. 1976).

A. *Jurisdictional Basis of Suit*

Initially, the question of the jurisdictional underpinning of the suit before us must be resolved. In his complaint, Geraghty claimed jurisdiction under (1) 28 U.S.C. § 2241 (the habeas corpus statute), (2) 5 U.S.C. §§ 700-706 (the Administrative Procedure Act), and (3) 28 U.S.C. § 1331 (federal question jurisdiction). The trial court held that under *Preiser* v. *Rodriguez*,[10] habeas corpus is the only remedial base available to the plaintiff. To the contrary, however, we conclude that it is appropriate to treat this action as one for declaratory judgment under 5 U.S.C. §§ 700-706 (1970) and 18 U.S.C. § 4218(c) (1976).

In *Preiser*, state prisoners brought suit seeking an injunction restoring "good time" credits that they claimed were unconstitutionally taken from them. The Supreme Court held that since the prisoners were challenging the fact or duration of their imprisonments, § 1983 was unavailable, and their sole federal remedy was by habeas corpus. The *Preiser* opinion rested on two grounds. First, the Court noted that the interest in federal-state comity weighed against the advisability of allowing state prisoners to bypass the exhaustion requirement[11] of the state habeas corpus statute.[12] Second, the Court stated that the more specific provisions of the habeas corpus act should be

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[10] 411 U.S. 475 (1973).

[11] 28 U.S.C. § 2254(b) (1970).

[12] 411 U.S. at 490-92.

read to modify the general cause of action granted by § 1983.[13]

Neither of these considerations is applicable here. The courts face no barriers resulting from federal-state relations in adjudicating issues such as the ones before us, since the present controversy involves the application of a federal statute by federal authorities. And, unlike a habeas corpus action challenging state confinements, no exhaustion has been statutorily mandated. Indeed, in contrast to the situation, in *Preiser,* Congress expressly contemplated declaratory actions to challenge the provisions of the federal parole guidelines. 18 U.S.C. § 4218(c) (1976) declares that Parole Commission actions, except for individual parole decisions, are to be reviewable under the Administrative Procedure Act.[14] The legislative history of § 4218(c) states, *inter alia:*

> This section brings the Commission rule-making process within the coverage of the Administrative Procedure Act judicial review procedures. In this regard, the Conferees recognize the principles established in *Pickus v. United States,* 507 F.2d 1107 (1974).[15]

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[13] 411 U.S. at 489-90.

[14] 18 U.S.C. § 4218 became effective May 15, 1976. The suit in this case was filed in September of 1976.

[15] House Conf. Rep. No. 94-838 94th Cong. 2nd Sess. 36 *reprinted* 1976 U.S. Code, Cong. & Ad. News 351, 368. [hereinafter cited as Conference Report]

Pickus v. Parole Board,[16] entailed a challenge by prisoners to parole guidelines brought as an action for declaratory judgment under the APA. It appears that Congress in citing *Pickus* clearly evinced an intent to allow suits like the one before us to proceed by way of an action for declaratory judgment.[17]

Moreover, even under the strictures of *Preiser,* itself, the present action would not be inexorably channeled into the form of a habeas corpus proceeding. While the relief requested for Geraghty included "enlargement from custody" pending review of his parole status, such request is now moot. In comparison, the *class* relief sought was (a) a declaration that the parole guidelines are invalid, and (b) an injunction against further actions denying parole to other federal prisoners on the basis of the guidelines. This relief falls within the Supreme Court's holding in *Wolff v. McDonnell,* 418 U.S. 539, 554-55 (1974), that *Preiser* does not bar either a declaratory judgment or a prospective injunction against enforcement of unconstitutional regulations relating to revocation of good time credits. The class does not demand that its members be released on parole, but only that the Parole Board not utilize the guidelines in evaluating future parole applications.

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[16] 507 F.2d 1107 (D.C. Cir. 1974).

[17] This expression of intent by Congress renders inapplicable the Supreme Court's decision in *Califano v. Sanders,* 45 USLW 4209 (1977). *Califano* held that as a matter of statutory construction, the APA does not confer jurisdiction on federal courts, absent other statutory authorization.

Therefore we conclude that this suit may proceed as an action for declaratory judgment.[18]

B. *Mootness*

We are next faced with a challenge to this Court's jurisdiction on the basis of mootness. After the appeal was filed, but prior to oral argument, Geraghty was released from confinement. Since, at trial, Judge Herman declined to certify this case as a class action, the government contends that the matter is now moot because of Geraghty's release. The argument proceeds that Geraghty, as the named plaintiff, has no further stake in the operation of the parole guidelines, and no class, in fact, has been certified to assert an interest in the guidelines.[19]

Geraghty makes two responses to the claim of mootness. First, he declares that challenges to the parole guidelines represent a situation where a legal injury is "capable of repetition yet evading review." Prisoners

[18] *Bijeol v. Benson*, 513 F.2d 965, 967 (7th Cir. 1975) and *Biliteri v. U.S. Parole Bd.*, 541 F.2d 938, 947-48 (2d Cir. 1976), may appear to be at odds with our decision. The Court in *Bijeol*, however, did not have before it the provisions of 18 U.S.C. 2418. And in *Biliteri* the plaintiff requested neither declaratory nor prospective injunctive relief, and did not challenge the propriety of the guidelines.

This Court's holding in *Marerro v. Warden*, 483 F.2d 656, 659-60 (3d Cir. 1973), *rev'd on other grounds* 417 U.S. 653 (1974), that habeas corpus may be used to attack a denial of parole does not undermine our result, for we in no way intimated in *Marerro* that *habeas corpus* was the sole route available. *Cf. Preiser v. Rodriguez*, 411 U.S. 475, 498-99 (1973) (habeas and § 1983 are alternative remedies with respect to prison conditions).

[19] *See Board of School Commissioners of Indianapolis v. Jacobs*, 420 U.S. 128 (1975); *Weinstein v. Bradford*, 423 U.S. 147 (1975); *Pasadena Bd. of Educ. v. Spangler*, 427 U.S. 424, 430 (1976).

will often be released before their cases are finally resolved in the appellate courts. Therefore, he avers, the case before us comes within a traditional exception to the mootness doctrine.[20] Second, Geraghty maintains that his case is encompassed by the principle that a class action is not moot simply because the claims of the named plaintiff are rendered academic. He urges that the failure of Judge Herman to grant class action status was an abuse of discretion and that subsequently granted class status should be permitted to "relate back" to the time when Geraghty had a live claim.[21]

Resolution of the justiciability of this case in light of the mootness objection is best undertaken in the context of a somewhat extended discussion of this evolving doctrine.[22]

[20] *See, e.g. Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115 (1974); *United States v. New York Telephone Co.*, 46 U.S.L.W. 4033, 4035 n.6 (1977); *United States v. Frumento*, 552 F.2d 534 (3d Cir. 1977) (en banc).

[21] *See, e.g. Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975); *Williams v. Wohlgemuth*, 540 F.2d 163, 167 (3d Cir. 1976).

The plaintiff also presses the application of Eliezer Becher to intervene as a named plaintiff. Becher, like Geraghty, has been an inmate of Lewisburg who had been denied parole. Unlike Geraghty, however, Becher had not been released at the time his motion to intervene was argued before this Court. Becher's motion was originally presented after the appeal to this Court had been docketed, and the district court divested of jurisdiction. His request to intervene was therefore denied. Since we conclude that the case must be remanded to the district court for other determinations, it is also appropriate that Becher's motion to intervene be remanded for a determination as to the reasons for his failure to intervene earlier, and an examination of the potential prejudice, if any, which might result from such intervention. *See Pennsylvania v. Rizzo*, 530 F.2d 501 (3d Cir.) *cert. denied* 426 U.S. 921 (1976). *Cf. United Air Lines v. McDonald*, 45 USLW 4760 (1977).

[22] The development of the principles governing mootness and their interaction with the emergence of class actions has been the subject of a considerable number of recent scholarly discussions. *See H. Newberg, Newberg on Class*

1. *Contours of Mootness Doctrine*

The principle that a court may not decide a moot case arose primarily from rules of equity and common law, as well as from traditional notions of the functions of courts.[23] It was only in the last decade that the attitude of the Supreme Court toward the adjudication of moot cases became definitively intertwined with the mandate of Article III, which provides that the power of the judiciary is limited to cases or controversies.[24]

Still more recently, however, the Supreme Court has made clear that elements of the "mootness" doctrine find their roots not only in constitutional dictates, but also in more flexible considerations of pol-

22. (Cont'd.)

Actions §§ 1085-1092 (1977); Kane, *Standing, Mootness and Federal Rule 24—Balancing Perspectives*, 26 Buffalo L. Rev. 83 (1976); *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1163-71 (1976); Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 Duke L.J. 573; *The Mootness Doctrine in the Supreme Court*, 88 Harv. L. Rev. 373 (1974); Note, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672 (1970); Note, *A Search for Principles of Mootness in the Federal Courts, Part One, the Continuing Impact Doctrine*, 54 Texas L. Rev. 1289 (1976); *Part Two, Class Actions id.* 1310.

23 *See* Note, *The Mootness Doctrine, supra* note 22, 373 and 374-75 nn 9-11 (1974); Note, *Mootness on Appeal, supra* note 22, at 1672, 1673-74 n.12 (and authorities cited therein).

24 U.S. Const. Art. III § 2. The first mootness holding explicitly couched in terms of Art. III jurisdictional limitations was *Sibron v. New York*, 392 U.S. 40, 57 (1968), although the Court had referred to Art. III limitations in *Liner v. Jafco*, 375 U.S. 301, 306 n.3 (1964) and *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). *See* Note, *Mootness Doctrine, supra* note 22, at 375, Note, *Mootness on Appeal, supra* note 22 at 1673-74; *cf. G. Gunther, Constitutional Law* 1578-80 (9th Ed. 1975) (evidencing skepticism about recent assertion of constitutional origins of mootness doctrine).

icy.[25] The first step in our mootness analysis, therefore, must be to attempt to etch the outlines of the constitutional elements of this doctrine.

The constitutional command that matters submitted to the judiciary for resolution must be within the category of "case or controversy"

> limits the business of the federal courts to questions presented in an adversary context, and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.[26]

As we understand the constitutional requirements, a case presented for adjudication must be an actual, concrete dispute over legal rights; the controversy may not be a hypothetical one.[27] In addition, at the commencement of suit, the dispute must concern some

25 *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 755-57 and n.8 (1976) (for a unanimous court on this point); *Kremens v. Bartley*, 45 U.S.L.W. 4451, 4453, 4454 (1977). *See Kane, supra* note 22, at 84-88, 94.

26 *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968), quoted in *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 755 (1976). *See e.g.* Note, *Mootness Doctrine, supra* note 22 at 376-377.

27 The judgment of a federal court must resolve "a real and substantial controversy admitting of specific relief through a decree of a conclusive character as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975), *quoting North Carolina v. Rice*, 404 U.S. 244, 246 (1971), *quoting Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937).

individual plaintiff who is injured by the wrong in question.[28]

However, once a suit meeting these conditions has been instituted, the limitations of Article III do not absolutely require that an individual who is personally harmed by the wrongs continue to have a live dispute. Rather, the issues with regard to jurisdiction are:

(1) Whether a legal controversy exists sufficient to establish that the case is not hypothetical.

(2) Whether the controversy affects an individual in a concrete case sufficient to provide the factual predicate for the reasoned adjudication which is the province of the judiciary.

(3) In addition, the court must answer the more policy-oriented question whether the parties before it have, at the time for decision, sufficient functional adversity to sharpen the issues for judicial resolution.

The existence of a plaintiff with standing at the outset of the litigation insures the initial fulfillment of these three conditions; but the elimination of the individual grievance may bring such fulfillment into question. Once suit has been commenced, it nonetheless remains open to the court to determine that a case or controversy persists despite the disappearance of

[28] *See, e.g. Warth v. Seldin*, 422 U.S. 490, 498-501 (1975).

the named plaintiff as a "live" litigant.[29] Moreover, since the third consideration is not an absolute Article III requirement, in evaluating the degree of functional adversity, the court may ascribe weight to reasons of policy.[30]

We reach these conclusions on the basis not only of the Supreme Court's explications of the mootness doctrine, but in reliance on cases in which the Supreme Court has actually exercised jurisdiction.

2. *Actions Surviving Loss of Claim by the Named Plaintiff*

(a) *Repetitious Evasion of Review*

The first genre of disputes in which the Supreme Court has not required a continuing live stake was described by our Court in *United States v. Frumento* as the "most traditional of exceptions to the mootness doctrine."[31] This group of cases has utilized the rubric "capable of repetition yet evading review" to characterize controversies whose effect on plaintiffs is,

[29] *See* Kane, *supra* note 22 at 84-85, 94-96 (two part test exists: actual injury and controversy and discretionary determination), Note, *Mootness Doctrine, supra* note 22 at 389, 394-95 (discretion should look to impact of a decision on the merits on the necessity for future litigation. The amenability of a fact pattern to definitive resolution would imply that future litigation might be minimized by taking jurisdiction).

[30] *See* Note, *Developments in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1364-66, (1977) (Supreme Court has moved from the focus on continuing controversy with named plaintiff to an inquiry into the status of legal issues in dispute between the class and the class adversary); Note, *Mootness Doctrine, supra* note 22 at 388-395 (non-mootness may be predicated upon existence of injury to class).

[31] 552 F.2d 534 (3d Cir. 1977) (en banc).

by their very nature, of limited duration. In such instances it is unlikely that any person will retain a live stake in the outcome of the case by the time it has made its way through the appellate process. Nonetheless, the actions complained of are likely to be repeated, and therefore present the possibility of a recurring but a judicially irremediable wrong unless jurisdiction is retained.[32]

In many of these cases, the party who originally brought suit can present a plausible argument that he or she will be subject to a recurrence of the conduct at issue, and accordingly continues to have a personal stake in the controversy. To this extent, the plaintiff retains a "live" interest. Such hypothesis, however, in many cases would clearly fail to meet the standards imposed on litigants at the outset of a case to show "standing,"[33] and in others seem to be keyed

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[32] *E.g. Pacific Terminal Co. v. ICC*, 219 U.S. 498 (1911) (regulatory order effective for two years); *Roe v. Wade*, 410 U.S. 113 (1973) (gestation period as limit to impact of abortion law); *Sosna v. Iowa*, 419 U.S. 393 (1976) (one year residency requirement for divorces); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (one year residency period for eligibility to vote); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976) ("gag order" limited to duration of trial); *Super Tire Engineering Corp. v. McCorkle*, 416 U.S. 115, 125-27 (1974) (welfare benefits to striking workers); *United States v. New York Telephone Co.*, 46 USLW 4033, 4035 n.6 (Dec. 1977) ("pen register" order of limited duration). *Gerstein v. Pugh*, 420 U.S. 103 (1975) (pretrial detention). *See* Note, *Mootness Doctrine*, *supra* note 22 at 383-388, *Singleton v. Wulff*, 428 U.S. 106, 117 (1976) (dictum).

Cf. Preiser v. Newkirk, 422 U.S. 395 (1975) (challenge to prison disciplinary procedure moot where punishment of named plaintiff under procedure had ceased, no class action had been alleged, and plaintiff could have no "reasonable expectation of repetition" of the procedure in question).

[33] *Compare e.g. United States v. New York Telephone Co.*, 46 U.S.L.W. 4033 (1977); *Nebraska Press Assn. v. Stewart*, 427 U.S. 539 (1976); *Super*

to the notion that the conduct at issue may be repeated with respect to someone within the class represented, although not with respect to the particular named plaintiff.[34]

If the disputed action will, with reasonable probability, recur in the near future and the issues may be resolved without reference to nuances of particular fact situations, the constitutional prerequisites of a legal controversy and a concrete factual predicate may be satisfied despite the lack of a named plaintiff before the court who retains his original interest in the conflict. The potential for repetition with respect to such plaintiff may itself be one indication of the satisfaction of the further prudential criterion of functional adversity, but the unfairness of an evasion of review may also be relevant to the exercise of discretion. Repetition is not, however, the sole possible indication of either constitutional or discretionary justiciability.

(b) *Class Actions*

In the related area of the mootness of class actions, the Supreme Court has consistently held that once a

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33. (Cont'd.)

Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974) with *Warth v. Seldin*, 422 U.S. 490 (1975); *Simon v. Eastern Ky. Welfare Rights Ass.*, 426 U.S. 26 (1976).

[34] *See Roe v. Wade*, 410 U.S. 113 (1973) (other pregnant women denied abortion, even after plaintiff's term of pregnancy); *Sosna v. Iowa*, 419 U.S. 393, 399-403 (1975) (1 year residency requirement for divorce, applicable to other potential divorcees); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (1 year voter residency requirement applicable to others who move into the voting district).

class action is certified, the mooting of a claim set forth by the named plaintiff does not automatically deprive a court of jurisdiction over the cause of action asserted by the class. A justiciable legal controversy may continue to exist between the class as an entity and the defendant, thus satisfying Article III. Originally, this holding was articulated in the context of class actions dealing with claims that were also capable of repetition but evading review.[35]

But the Supreme Court has, in other situations, sustained the justiciability of what may be referred to as "headless" class actions; that is class actions in which the named plaintiff retains no "live" claim. In *Richardson v. Ramirez*,[36] the Court adjudicated the complaint of a class composed of California ex-prisoners, despite the fact that three named plaintiffs already had obtained the relief they sought. The action challenged the denial of voting rights to ex-felons under California law. By the time the case reached the appellate court, however, the three named ex-felons had already been registered to vote by the named defendants, three county clerks charged with enforcing election statutes. Nonetheless, the California Supreme Court issued a declaratory judgment.

On review, the Supreme Court noted that inasmuch as the opinion of the California tribunal was binding

[35] *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Sosna v. Iowa*, 419 U.S. 393 (1975); *Roe v. Wade*, 410 U.S. 113 (1973); *Dunn v. Blumstein*, 405 U.S. 330 (1972).

[36] 418 U.S. 24 (1974).

on all county clerks, the underlying issue evaded review by being "incapable of repetition."[37] In addition, since the Court interpreted the case as an action against a class composed of all county clerks, it identified a "live" controversy between the non-consenting clerks and felons who, in the future, might wish to register in their districts. Although it is clear that the named plaintiffs could not have commenced suit simply by claiming that they wished to move to the other counties and register to vote,[38] once suit was appropriately instituted, the Supreme Court took notice of an on-going controversy with unnamed class members.

More recently, in *Franks v. Bowman Transportation Co.*,[39] an action under Title VII of the Civil Rights Act of 1964, the Supreme Court acknowledged the viability of a headless class action, where the lone named plaintiff had lost his eligibility for relief as a result of subsequent misconduct. Inasmuch as the plaintiff class had been properly certified, the Court held that a continuing legal controversy was clear, and the case was not constitutionally moot. The Court also attributed the earlier linkage of headless class actions to situations capable of repetition but evading review to "policy rules" rather than to the constitu-

[37] 418 U.S. at 35.

[38] *See Warth v. Seldin*, 422 U.S. 490, 514-517 (1975).

[39] 424 U.S. 747 (1976).

tional element of justiciability.[40] Identifying a situation repetitiously evading review was only one method of establishing sufficient "functional adversity," the Court held. In *Bowman* the class certification combined with the factors that the class members were easily identifiable, clearly entitled to a remedy, and had demonstrated competence and tenacity in their litigation subsequent to the disqualification of the class representative, satisfied the requirements of the mootness doctrine.[41]

From the *Ramirez* and *Bowman* cases, plus the class-oriented "repetition" cases, we draw the conclusion that a continuing conflict between a clearly-defined class and a defendant remains an Article III case or controversy even after the named plaintiff loses his personal stake in the outcome. And, if the evidence indicates a possibility of evasion of review, or a clear continuing functional adversity, the discretionary component of the mootness doctrine is also satisfied.

Thus, in the case before us, if Geraghty's suit had been properly certified as a class action before he had

[40] 424 U.S. at 756 n.8. *See* 424 U.S. at 781 (opinion of Powell, J. joined by Rehnquist, J. concurring on this point).

[41] 424 U.S. at 756-57. In contrast, in *E. Texas Motor Freight Systems, Inc. v. Rodriguez*, 45 U.S.L.W. 4524 (1977), where the plaintiff had *never* been a part of the class which he sought to represent, it was held that the class was improperly certified on appeal. *Cf. Kremens v. Bartley*, 45 U.S.L.W. 4451 (1977), where the Supreme Court held that changes in law so fragmented the interest of the plaintiff class that it could no longer clearly identify a common interest.

been released from prison, it would have been jurisdictionally appropriate to continue to entertain the suit even after his release. Obviously, a large number of prisoners remain subject to the parole guidelines, and insofar as the guidelines result in their being denied parole, such prisoners clearly are adversely affected. In adjudicating this matter, a court therefore would not be concerned merely with an abstract or hypothetical conflict. And a proper class certification would bring into focus the "functional adversity" necessary for adjudication.

3. *The Impact of Denial of Class Certification*

In this case the trial court refused class certification. The question, then, is whether such refusal combined with Geraghty's release prevents our review of this matter, on the ground that we have before us neither a "live" plaintiff nor a properly certified class.

The Parole Commission earnestly contends that under *Board of School Commissioners of Indianapolis v. Jacobs*,[42] in the absence of a properly certified class the mooting of a named plaintiff automatically removes the suit from the category of a justiciable case or controversy. Reading *Jacobs* in this fashion, however, is incompatible with the Supreme Court's holdings in both prior and subsequent cases.[43]

[42] 420 U.S. 128 (1975).

[43] The statements in *Sosna*, *Franks*, *Gerstein*, and *East Texas* that justiciability remains "given a properly certified class" may simply point to *certifiability*, not actual certification, as the crucial question. *See Satterwhite*

In *Gerstein v. Pugh*,[44] the short duration of challenged pretrial custody precluded a class from being certified before the named plaintiffs were released. Nevertheless, the district court certified a class of pretrial detainees, and entertained the action. Noting that the challenged procedures would continue to apply to a succession of pretrial detainees, the Supreme Court held that the class certification preserved justiciability even though the certification might have been entered after the named plaintiffs lost a "live" interest in the suit.[45]

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43. (Cont'd.)

v. City of Greenville, 557 F.2d 414, 417-421 (5th Cir. 1977) *rehearing en banc granted; Frost v. Weinberger*, 515 F.2d 57, 64 (2d Cir. 1975) (Friendly, J) (*Sosna's* insistence on continuing existence of individual claim until certification is "drained" by "relation back" doctrine). Similarly, *Weinstein v. Bradford*, 423 U.S. 127 (1975), which dismissed a parole challenge as moot, is inapposite here since the *Weinstein* plaintiffs did not appeal the denial of class certification. *Cf. Scott v. Kentucky Parole Board*, 429 U.S. 60 (1976) (individual action, no attempt to certify class).

44 420 U.S. 103 (1975).

45 The stated rationale, that the later certification "related back" to the time that the plaintiffs had claims is at best a legal fiction. *See Gardner v. Westinghouse*, (Seitz, J. concurring) No. 76-1410 (3d Cir. 1977) slip op. at 18-19, *cert. granted* — U.S. —; *Frost v. Weinberger*, 515 F.2d 57, 64 (2d Cir. 1975).

The *Gerstein* decision had been presaged by *Kelly v. Wyman*, 294 F. Supp. 887, 890 (S.D. N.Y. 1968) *aff'd sub nom. Goldberg v. Kelly*, 397 U.S. 254, 256 n.2 (1970). There the district court refused to dismiss a challenge to welfare regulations before class certification despite an allegation that most if not all of the named plaintiffs had been reinstated to welfare, on the ground that "plaintiffs claim to represent a class." The Supreme Court affirmed the class relief, noting that some of the then-named plaintiffs were still embroiled in disputes with the welfare department. It was not clear, however, whether those plaintiffs had been named at the time of the original decision or had subsequently intervened. *See Goosby v. Osser*, 409 U.S. 512 (1973) (adjudicating class action of prisoners confined to pretrial detention, despite the fact

The Supreme Court in *Baxter v. Palmigiano*[46] adjudicated a controversy concerning prison regulations, although the case had not been properly certified as a class action and the named plaintiffs had died or had been released prior to the oral argument on appeal. The Supreme Court held that the subsequent intervention of another prisoner brought a justiciable case before the Court. This was so despite the fact that it was not clear that when the intervention had occurred, the district court still had a "live" individual plaintiff before it.

Most recently, in *United Airlines v. McDonald*,[47] the Supreme Court reviewed a refusal to allow putative class members in an employment discrimination suit to intervene in order to appeal a denial of class certification. By the time the motion for intervention was presented, the original named plaintiffs had already been awarded relief and as to them the case was moot. Again, intervention was permitted at a time

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45. (Cont'd.)

that apparently there was no indication whether they had been released prior to class certification); *Conover v. Montemuro*, 477 F.2d 1073 (3d Cir. 1973) (*en banc*) (allowing class action on behalf of juvenile detainees, despite the fact that named detainees had been released after short time).

Since *Gerstein* a number of courts have allowed certification on a "relating back" theory. *E.g. Williams v. Wohlgenmuth*, 540 F.2d 163 (3d Cir. 1976); *Basel v. Knebel*, 551 F.2d 395, 397 (D.C. Cir. 1977); *Zurak v. Regan*, 550 F.2d 86 *cert. denied* — U.S. — (2d Cir. 1977).

46 425 U.S. 308, 311 n.1 (1976).

47 45 U.S.L.W. 4760 (1977). *Cf. Haas v. Pittsburgh National Bank*, 526 F.2d 1083 (3d Cir. 1975) (allowing substitute plaintiff to intervene for named plaintiff who never had standing, but allowing filing of original class action to toll statute of limitations).

when the named plaintiffs no longer retained "live" claims.

In light of *Gerstein,* handed down on the same day as *Jacobs,* and of *Baxter* and *McDonald,* both decided after *Jacobs,* the *Jacobs* case should not be viewed as standing for the proposition that the federal courts are constitutionally barred from continuing to adjudicate disputes when the named plaintiff no longer retains his claim. So long as a factually concrete legal controversy continues to exist, it would appear that the constitutional *power* of a court over the case remains. Consequently, the holding of *Jacobs* is perhaps best understood as a specific instance that must be seen in the context of the over-arching set of principles adumbrated by the authorities cited above.

In *Jacobs,* the Supreme Court reviewed a First Amendment challenge by a group of students to regulations limiting publication of a newspaper. Since the students had graduated, and the periodical in question had ceased publication, the inability to delimit accurately the plaintiff class deprived the Court of the assurance of justiciability. In addition, the failure of counsel to seek a proper class certification cast serious doubt on the continued adequacy of the adversarial clash.[48]

[48] As other courts have noted, the failure to certify the class in *Jacobs* was not assigned as error *Napier v. Gertrude,* 542 F.2d 825, 827 (10th Cir. 1976) *cert. denied* — U.S. — (1977); *Gardner v. Westinghouse,* No. 76-1410 (3d Cir. 1977) slip op. at 18 n.5 (Seitz, J. concurring) *cert. granted* — U.S. —.

An appropriately defined and certified class assures the courts that the case involves a concrete legal controversy, proper factual predicate, and functional adversity. The lack of certification, however, does not inevitably require dismissal, if the elements of justiciability are otherwise established.[49] Thus, in *Gerstein, Baxter,* and *McDonald* no doubt could validly have been raised concerning the continuation of the underlying legal controversies. Counsel in *Gerstein* and *McDonald,* could not have been charged with responsibility for the failure of certification, and in both *Baxter* and *McDonald* the continuation of the adversarial difference was assured by the intervention of live plaintiffs. In those situations, a concrete dispute continued and representation was adequate. Consequently, the cases were not dismissed.

[49] We acknowledge that the courts of appeals are divided on the question of whether under the recent Supreme Court decisions, the denial of class action status is appealable by a named plaintiff whose claim has become moot. *Banks v. Multi Family Management,* 554 F.2d 127 (4th Cir. 1977) (Refusal to certify since development of mootness was not "inherent in the nature of the claims," and the named defendant had already agreed to relief sought); *Satterwhite v. City of Greenville,* 557 F.2d 414 (5th Cir. 1977) *rehearing granted en banc* (refusal to certify class is appealable if improper if at the time that the class should have been certified, and the named plaintiff still had a live claim at that time); *Kuahulu v. Employers Insurance of Wausau,* 557 F.2d 1334 (9th Cir. 1977) (survival of action is governed by "idiosyncracies of each case;" action in question did not survive, but the Court suggests a number of situations in which it might); *Winokur v. Bell Federal Savings and Loan,* 560 F.2d 371 (7th Cir. 1977) (damages claimed were tendered to individuals, nonplausible claim of repetition, no review allowed of failure to certify class. Dictum that issue of class certification cannot survive mooting of individual claim); *Napier* v. *Gertrude,* 542 F.2d 825 (10th Cir. 1976) (review available where failure to certify is "correctable on appeal," correctability is a function of particular situations, mainly available in situations otherwise evading review).

In the matter before us, there is neither a contention by the government nor evidence in the record which raises any question but that a legal controversy exists. The fate of numerous federal prisoners continues to turn in large part on the application of the guidelines in question. Such a situation in our view satisfies the "case or controversy" components of the mootness doctrine. Further, under the circumstances of this case, the more discretionary elements of the restrictions against entertaining moot cases do not mandate dismissal. Four aspects of the case lead to this conclusion.

First, Geraghty's action, while not wholly congruent, shares many characteristics with the cases denominated "capable of repetition, yet evading review." This is so since federal prisoners are eligible for parole if their sentences exceed one year.[50] Accordingly, while some prisoners will retain their grievances long enough to achieve appellate review, a number of prisoners with short sentences, like Geraghty, will inevitably be discharged before they have an opportunity to litigate fully the legality of the rules which deny them parole. This alone is a factor weighing heavily in favor of justiciability.[51] And since it is the prisoners with unusually short sentences to whom the parole

[50] 18 U.S.C. § 4205 (1976).

[51] *See Zurak v. Regan*, 550 F.2d 86 (2d Cir. 1977) (prisoners whose complaints on parole procedure would often—but not always—evade review were allowed to "relate back" certification to a time before the named plaintiff's release). *Cf. United States v. Frumento*, 552 F.2d 334 (3d Cir. 1977) (*en banc*) (compulsion to testify before grand jury).

guidelines deny the benefit of the trial judge's leniency,[52] the limited probability of review for a prisoner with a short sentence is particularly pertinent.

Second, as we have noted, this case involves denial of a class action certification. As Chief Judge Seitz observed in *Gardner v. Westinghouse*,[53] if mooting of a named plaintiff's claim bars review of a denial of class certification our rule against interlocutory appeals of class certification orders will, in a significant number of cases, effectively immunize from review such adverse class determinations. This is hardly a salutary result for, although class certification had been improperly denied, a constitutionally justiciable controversy nevertheless continues to exist.

Third, the attorneys for Geraghty, while not possessed of a legally continuing relationship with members of the plaintiff class,[54] have nonetheless undertaken this litigation on a class-oriented basis. There is no indication of any diminution of vigor in their efforts despite the release of Geraghty. Indeed, as already observed, they represent another individual plaintiff who now seeks to intervene in the matter. Consequently, there is a *prima facie* case of functional adversity, a central element which the mootness doctrine seeks to preserve.

[52] The government's brief in this action (p. 12) suggests that only prisoners with short sentences have an interest in attacking the guidelines' failure to take account of sentence length.

[53] Slip op. No. 76-1410 (3d Cir. 1977) (Seitz, C.J. concurring), *cert. granted* — U.S. —.

[54] *Cf. Gerstein v. Pugh*, 420 U.S. 103, 110, 111 n.11 (1975) (public defender had continuous relationship with class of pretrial detainees).

Finally, the major issues in the case in no way appear to be tied to the nuances of individual fact patterns. The discharge of Geraghty does not alter either the interests of the members of the putative class [55] or the practice of the Parole Commission in applying its guidelines.[56]

Hence, if class certification is appropriate in this case, the mootness of Geraghty's claim should not bar adjudication.

C. *Trial Court's Refusal to Certify Class Action Status*

Class certification was denied by the district court as neither "necessary nor appropriate." [57] It was not necessary, Judge Herman held, because the possibility of avoiding mootness is not expressly comprehended in the criteria of Rule 23. We agree with the trial court that a possibility of avoiding mootness on appeal would not, of itself, be a sufficient basis for conferring class action status on a suit otherwise barred by Rule 23. Rule 23, however, allows litigants to bring class actions so long as they meet its standards. The plaintiff here need not have proved that certification was "necessary," as the trial judge seemed to indicate, but only that there was compliance with the prerequisites of Rule 23.

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[55] *Cf. Kremens v. Bartley*, 431 U.S. 119 (1977).

[56] *See* Note, *Mootness Doctrine*, *supra* note 22 at 394. *Cf. De Funis v. Odegard*, 416 U.S. 312 (1975).

[57] A. 46.

Judge Herman stated that the class action was not "appropriate" on a number of grounds. First, he correctly held that two of the issues raised—namely, the classification of Geraghty's offense under the guidelines and Geraghty's access to certain Commission files—had no class-wide applicability. Second, the trial judge held that since the challenge to the guidelines based on the conflict with the statute under which Geraghty was sentenced,[58] "is inapplicable to all members of the proposed class," class certification as to all prisoners was inappropriate. Finally, the court noted that while the guidelines had the effect of lengthening Geraghtys' incarceration, they would also have the effect of shortening the length of confinement of individuals who had been sentenced to terms greater than three times the period recommended by the guidelines. Thus, the court concluded, Geraghty's claims were not typical of the class he purported to represent.[59]

The trial judge is correct in his observation that not all of the grounds of action alleged in the complaint are applicable to the class of "all federal prisoners who have been or will become eligible for release on parole." [60] The conclusion that this implies that a class

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[58] 18 U.S.C. § 4208(a)(2) (1970).

[59] Judge Herman also held that the district court's habeas corpus jurisdiction did not extend to members of the class located outside of the Middle District of Pennsylvania. Since we hold that jurisdiction lies to consider this action as one for declaratory judgment, we need not reach this question.

[60] Complaint, ¶ 5(a)(A2).

action is inappropriate, however, does not properly acknowledge the powers and duties of the trial court under section (c)(4) of Rule 23.[61] Under section (c)(4), the trial judge has the power to certify certain issues as subject to class adjudication, and to limit overbroad classes by the use of sub-classes. Indeed, this authority may be exercised *sua sponte*.[62]

Failure to exercise such power in a proper case has been held to be an abuse of discretion. In *Samuel v. University of Pittsburgh*,[63] for example, we concluded that the trial court's decision to decertify a class because of the administrative difficulty of computing damages was an abuse of discretion. If managerial difficulties were present, we held, "some investigation into the possible usefulness of subclasses, as suggested by Rule 24(c)(4)(B), should have been undertaken before decertification was ordered."[64]

[61] Section 23(c)(4) reads: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

[62] *See, e.g. Brown v. United States*, 508 F.2d 618, 627 (3rd Cir. 1975) (affirming limitation of class in part) *cert. denied* 422 U.S. 1027 (1975); *Swarb v. Lennox*, 314 F. Supp. 1091, 1098-99 (1970 E.D. Pa.) (three-judge court, limiting class *sua sponte*) *aff'd in part*, 405 U.S. 191 (1972); *C. Wright & A. Miller, Federal Practice & Procedure* § 1759 p. 575-76 (". . . if the plaintiff's definition of the class is found to be unacceptable, the court may construe the complaint or redefine the class to bring it within the scope of Rule 23"); Id. at § 1790; *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 179-186 (Douglas, J. concurring and dissenting); *AAMCO Automatic Transmissions, Inc. v. Tayloe*, 407 F. Supp. 430 (E.D. Pa. 1976) (redefining class). Note, *Developments in the Law, supra* note 22 at 1479-93 (discussing possibilities of sub-classing and class redefinition).

[63] 538 F.2d 991 (3d Cir. 1976).

Consequently, the district court need not have refused class certification *in toto* because certain claims were inapplicable to the entire class. Rather, with respect to those claims, it could have certified the class as to the prisoners to whom the claims applied. It was completely open to the trial judge to refuse certification with respect to the claims personal to Geraghty (access to files and offense severity classification), but then to certify claims relating to 18 U.S.C. 4208(a) (1970) only as to prisoners sentenced under that statute, and to certify the broader statutory and constitutional claims as to the entire prisoner class. A forbearance to consider these options constituted a failure properly to exercise discretion.

Similarly, the refusal to certify entirely because of potential inconsistencies between Geraghty's interest and those of other members of the putative class was improper in this case. First, it is not clear that a divergence in interest exists. It is true that prisoners who have been released under the guidelines have no legal interest in challenging the guidelines. Since, how-

[64] 538 F.2d at 996. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 453 (3d Cir. 1977) *cert. denied* U.S. ("even assuming that the court were correct in its conclusion that the lease claim is not appropriate for class determination, it nevertheless should have considered certification of the trademark claim under Rule 24(c)(4)(a)"); *Wright & Miller, supra* note 62 at § 1790, p. 185-87. ("Rule 23(c)(4) imposes a duty on the court and gives it ample power . . . it is not bound by the plaintiff's complaint and should not dismiss the action simply because it misdefines the class or issues when the court can correct the situation under 23 (c)(4)"). *Newberg, Class Actions, supra* note 22 at § 1120h (if conflicting interests can be protected by sub-classification, conflict should not preclude class action).

ever, invalidation of the guidelines would not nullify their paroles, they have no interest adverse to the plaintiffs.

On the other hand, it could be argued that prisoners whose parole dates have been scheduled, under the guidelines, for the future have an interest in maintaining the assurance provided by their presumptive parole dates. However, for prisoners like Geraghty, whose "customary release dates" fall beyond the length of time for which they are imprisoned, the guidelines are of no possible benefit. Within this last subclass, at least, there is no incompatibility of interest. By not considering the use of Rule 24(c)(4) to establish a subclass, the court did not exercise an informed discretion and therefore its action cannot be sustained.[65]

Accordingly, we reverse the denial of class certification. However, since it is appropriate that the district court make the initial evaluation of the proper subclasses, the case should be remanded on this point.[66]

III. The Validity of the Guidelines

A remand for resolution of the class certification dispute would improvidently dissipate judicial effort

[65] *Cf. Wetzel v. Liberty Mutual Ins. Co.*, 508 F.2d 239, 253 (3d Cir. 1975) (subclassification "is required where the class includes subclasses with divergent interests, or where certain representatives adequately represent only one group and other representatives represent another group.") *cert. denied* 421 U.S. 1011 (1975).

[66] In addition to determining the proper boundaries of the subclasses in this case, the district court must ascertain whether the other prerequisites of class certification have been met. It may also wish to seek *amici curiae* to represent divergent interests of subclasses.

if the district court were correct in its determination that Geraghty's substantive contentions are devoid of merit. Thus, it is fitting, and indeed necessary, for us to consider the merits of Geraghty's claim regarding the guidelines.

Geraghty offers three major challenges to the validity of the guidelines: (1) the guidelines' "fixed and mechanical" approach violates both the PCRA and the Constitution; (2) the guidelines transgress both statutory and constitutional commands insofar as they fail to take account of the sentences imposed by the district courts; and (3) as applied to prisoners sentenced before their adoption, the guidelines constitute impermissible *ex post facto* legislation.[67]

A. *The PCRA and the Guidelines*

The first two contentions require analysis of the statutory scheme of the PCRA. Since this is true, and since the government maintains that the PCRA specifically ratified the practices in question, we shall analyze the propriety of the alleged "fixed" and "mechanical" nature of the guidelines together with their alleged disregard of judicially imposed sentences.

[67] While the *ex post facto* contention was not pressed strongly on appeal, it formed a central element of the complaint and the district court's opinion. Moreover, challenges on appeal to the "retroactive" effect of PCRA (plaintiff's brief p. 57) seem to be rooted in the *ex post facto* prohibition.

Geraghty also alleges that the guidelines conflict with the Congressional intent underlying 18 U.S.C. § 4208(a)(2) (1970). If we determine that the guidelines are consistent with the Congressional intent in adopting the PCRA, this objection is substantially undercut, for the PCRA reenacts and recodifies the provisions of § 4208(a)(2) as 18 U.S.C. § 4205(b) (1976). Insofar as this is a change in the law, it can be analyzed under the discussion of the *ex post facto* objections.

1. *The Characteristics of The Guidelines*

Before beginning our exploration of the PCRA, we outline the features of the guidelines to which Geraghty objects. According to Geraghty, the guidelines find their origin in decisions by the Parole Board to categorize a series of 51 "offenses" into six severity levels,—low, low moderate, moderate, high, very high, and greatest—without regard to the actual sentences imposed for each offense.[68] For the various severity levels, the median length of time served by prisoners in each of three "prognosis categories"[69] became the three "customary release dates" for that level. While admitting that in fixing severity levels it essentially followed the procedure which Geraghty outlined, the Commission denies that the median incarceration formed the basis of the "customary release date." Geraghty's proof is sufficient to raise a material issue of fact as to the method by which the "customary release date" is calculated by the Commission.

Geraghty alleges that, after the Commission has set its grid of "customary release dates," such release dates predetermine the time when prisoners will be paroled without regard to the individual facts of each case. This assertion is given substance by the Com-

[68] The "offenses" do not necessarily involve violations of different statutes. For example, income tax evasion (less than $10,000) is a different "offense" from income tax evasion ($10,000-50,000). Likewise, possession with intent to distribute "soft drugs" falls into categories ranging from low moderate to very high, depending on the amount of drugs possessed.

[69] These categories are identified by reference to "salient factor scores," which attempt to predict the probability of recidivism.

mission's admission that only 8.7% of the parolees in 1975 were released before the "customary release date," and by the apparent practice of referring only to the guidelines in denials of parole.[70] The Commission responds that under its regulations all "relevant evidence" is taken into account,[71] that decisions outside of the guidelines are permitted where circumstances warrant,[72] and that in fact guidelines represent "objective standards by which the *ad hoc* judgment of an individual's offense severity is measured."[73] However, the Commission presented no affidavits as to the actual working of parole decision-making. And on this subject, there appears to be a genuine difference regarding material facts.

Equally important, Geraghty notes that the sentence actually imposed by the trial judge is not a factor in determining the customary release date, and avers that under current procedures the sentence is not given any weight in the individual parole-determination process. He observes that current regulations have removed the prescribed sentence from the con-

[70] The statement of reasons which was given to Geraghty, for example, was duplicated in *Garcia v. United States Bd. of Parole*, 557 F.2d 100 (7th Cir. 1977); *Hill v. Attorney General*, 550 F.2d 901 (3d Cir. 1977) and *Fronczak v. Warden*, 553 F.2d 1219 (10th Cir. 1977). The Second Circuit has manifested disapproval of "mechanical" application of the guidelines by the Parole Board. *United States v. Jackson*, 550 F.2d 830, 832 (2d Cir. 1977); *United States v. Cruz*, 544 F.2d 1162, 1164-65 n.6 (2d Cir. 1976); *United States v. Torun*, 537 F.2d 661, 664 (2d Cir. 1976).

[71] 28 C.F.R. § 2.19(b).

[72] 28 C.F.R. § 2.20(c).

[73] Government's answer ¶ 37. A38.

siderations which must be taken into account. Significantly, the Commission, in its trial brief, admitted that no weight is given to the length of the sentence imposed by the trial judge.[74]

Since this case comes before us from a dismissal by summary judgment, and since Geraghty has provided factual support for his characterization of the guidelines, we must take his account as correct for purposes of this appeal.[75]

2. *The Legislation*

Although in 1973, the Parole Board had promulgated guidelines substantially similar to those currently being questioned, the first legislative authorization for such guidelines was contained in the PCRA of 1976. As part of a legislative overhaul of the parole system, the 1976 Act granted the newly-established Parole Commission the power and the duty to:

> promulgate rules and regulations establishing guidelines for the power [to grant or deny parole].

18 U.S.C. § 4203(a)(1) (1976).

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[74] Defendant's brief in opposition to petition for habeas corpus. (Filed Dec. 13, 1976) p. 19 n.8. The Board had previously asserted that to take sentence length into account in the guidelines would impede the guidelines' purpose of eliminating sentence disparity. 40 Fed. Reg. 41350 (1975). *Cf. United States v. Solly*, 559 F.2d 230, 233 (3d Cir. 1977) (neither sentence length nor trial judge's assessment of culpability has "apparent effect" on release decision).

[75] However, since the Parole Commission has presented contradictory material, and since a large part of Geraghty's proof is inferential, the case cannot be resolved by summary judgment in Geraghty's favor on the basis of the present record.

These guidelines are to be used in making parole decisions in accordance with statutory criteria:

> (a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:
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> (1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and
>
> (2) that release would not jeopardize the public welfare; subject to the provisions of subsections (b) and (c) of this section and pursuant to guidelines promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

18 U.S.C. § 4206 (1976).

Geraghty points to the statutory mandate that the parole decision be based on the "nature and circumtances of the offense and the history and characteristics of the prisoner." He maintains that under the guidelines, as they are utilized by the Commission, prisoners are denied individualized consideration of the "nature and circumstances" of their offenses, a consideration directed by the statute.

The Commission replies that nothing in the statute explicitly constrains its discretion in this regard. It

declares that in the first instance, the "nature and circumstances" are evaluated in the course of assigning a "severity rating" and, in any event, the provision in its regulations for decisions outside the guidelines satisfies any further statutory requirements.

Moreover, the Commission observes that while the statute explicitly requires consideration of a number of factors,[76] the length of the sentence imposed is not among them. Geraghty answers that since the control by the trial judge over the sentencing process is an integral feature of the criminal justice system as currently structured, the sentence actually imposed is "additional relevant information" whose consideration by the Commission must necessarily have been contemplated by Congress.

The text of the statute, in our opinion, seems capable of supporting either interpretation advanced. We therefore turn to other lines of analysis.

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[76] In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) presentence investigation reports;

(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and

(5) reports of physical, mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.
18 U.S.C. § 4207 (1976).

3. *The Legislative History*

Geraghty contends that, before the guidelines came into effect, the length of sentence imposed by the trial judge—rather than the Parole Commission's evaluation of the "severity" of the offense—constituted the primary means of establishing the length of imprisonment necessary to vindicate society's interest in incarceration.[77] Whether or not this is accurate, under H.R. 5727, the direct ancestor of the PCRA,[78] the sentence imposed by the trial judge was of controlling significance. Under H.R. 5727, a federal prisoner with good institutional behavior was to have been released upon completion of one-third of his sentence, unless the Commission affirmatively found release to be undesir-

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[77] The primary basis for this assertion is a study of the North Carolina parole system which found sentence length to be a primary determinant of length of imprisonment. This is not persuasive evidence of the characteristics of the Federal Parole System. Nonetheless, one study found that the belief was widespread among federal judges prior to the guidelines that the Parole Board's decisions were or should be based on judgments as to rehabilitation, rather than evaluations of severity. *Yale Note*, *supra* note 2 at 882-83 n.361, 890 n.388; *see Addonizio v. United States*, Nos. 77-1542, 77-1621, 77-2373 (3d Cir. Feb. 16, 1978). And the Commission has presented no evidence which convinces us that the primacy accorded to its severity judgment is reflective of practice prior to the guidelines.

[78] The PCRA was reported from the House Judiciary Committee on May 13, 1975 as HR 5727, accompanied by H. Rept. 94-184. It was considered and passed by the House on May 21, 1975.

The Senate Judiciary Committee reported an amended version of H.R. 5727 on Sept. 11, 1975, accompanied by Sen. Rept. 94-369. The amended version was passed by the Senate on Sept. 16, 1975.

A House-Senate conference committee reported a compromise bill on Feb. 23, 1976, and Feb. 24, 1976, respectively. The amended bill passed the Senate on March 2, 1976, and the House on March 3, 1976. *See* 1976 U.S. Code of Cong. & Admin. News 335.

able under the statutory criteria.[79] The virtue of having a "definite parole date at one-third of the sentence" [80] was the aspect of the bill which prompted the greatest comment in floor debate,[81] and no remarks by any Congressman indicate that the Commission was to be responsible for re-evaluating the adequacy of sentences.

There is no implication in the legislative history of the House Bill that the approach of the guidelines in establishing classes of offenders based on the Parole Commission's views of the severity rating of "offenses" in general was to have been ratified by the legislation. Indeed, comments during the floor debates manifest hostility to such an approach.[82]

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[79] § 4205 (House version)

"(a). A prisoner shall be released on parole if his record shows that he has substantially observed the rules of the institution in which he is confined on the date of his eligibility for parole, unless it is determined by an examining panel (as provided in section 4207(a)) that he should not be released on such date for one or more of the following reasons:

(1) there is a reasonable probability that such prisoner will not live and remain at liberty without violating any criminal law.

(2) there is a reasonable probability that such release would be incompatible with the welfare or society; or

(3) the prisoner's release on such date would so depreciate the seriousness of his crime as to undermine respect for law.

[80] Comments of Congressman Rodino, 121 Cong. Rec. H. 4510 (daily ed. May 21, 1975).

[81] *See e.g.* Comments of Congressman Kastenmeir *id.* at H. 4511; Comments of Congressman Railsback *id.* at H. 4511; Comments of Congressman Danielson *id.* at H. 4512; Comments of Congressman Badillo *id.* at H. 4516; Comments of Congressman Coghlin *id.* at H. 4516.

[82] Comments of Congressman Drinan at *id.* H. 4513 ("the committee clearly expressed its objection to a checklist or prototype denial statement"); Comments of Congressman Gude at *id.* at H. 4518 (Bill would produce "far

In contrast, the Senate version of the legislation anticipated the adoption of guidelines identical with those then in existence under the Parole Board.[83] These would guide the Commission in deciding whether the prerequisites for parole exist: "a reasonable probability that such person will remain at liberty, without violating the law," and "release is not incompatible with the welfare of society." [84] The decision was to be made substantially on the basis of "a report by the proper institutional officer," and the Commission's investigation.[85]

Further, in contrast to the House Bill, the Senate Bill specifically envisioned the new Commission's responsibility as encompassing revision of inappropri-

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82. (Cont'd.)

greater scrutiny and understanding of each prisoner's record, both before and during incarceration"). Rep. Gude was "greatly disturbed" by the apparently mechanical interaction of the "severity rating" and "salient factor score."

[83] Remarks of Senator Burdick, 121 Cong. Rec. S. 15953 (daily ed. Sept. 16, 1975) ("the rules and regulations repeatedly cited in the legislation include a set of guidelines adopted by the Parole Board."); Sen. Rept. No. 94-369, 94th Cong., 1st Sess. 25 [hereinafter, Senate Report], 1976 U.S. Code Cong. & Adm. News 346 (describing operation of system contemplated by statute "in relation to the present guidelines system").

Even the Senate version, however, recognized the danger of allowing too little discretion in the parole decision which "fails to take into account aggravating or mitigating circumstances of an offense, as well as the personal and family considerations which are the strongest predictors of whether or not the individual will return to a life of crime, or will be able to live a law-abiding life-style following release from incarceration." (remarks of Senator Burdick, *supra* at S. 15954). Senator Burdick considered that the Senate Bill "incorporated these factors" *id.*

[84] § 4206(a). (Senate version)

[85] § 4206(b). (Senate version)

ate judicially imposed sentences. The introduction to the Senate Report described parole as "an extension of the sentencing process." [86] The Report also referred to the "benefits" of the guidelines in "reducing the opportunity for sentencing disparity" and ensuring that "offenders sentenced for similar crime under similar circumstances will be required to serve comparable periods of incarceration" regardless of the statute under which they are sentenced.[87] Such a function would, of course, not be possible if the length of sentence imposed itself entered into the parole decision.

In the words of Congressman Kastenmeir, a sponsor of the House version, the bill which ultimately emerged from the Conference "required considerable compromise on the part of conferees on both sides." [88] The controlling effect of the sentence length was eliminated, but on the other hand characterization of parole as an "extension of the sentencing process" was deleted from the statement of purposes otherwise identical with the Senate version.[89] The Bill is described as "having the practical *effect of balancing* differences in sentencing policies between judges and courts," rather than having the purpose of eliminating sentencing disparities.[90]

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[86] Senate Report at p. 15, 1976 U.S. Code, Cong. & Adm. News 337.

[87] *Id.* at 18-19 and 340.

[88] 122 Cong. Rec. H. 1499 (daily ed. March 3, 1976).

[89] Conference Report at 19-20, 1976 U.S. Code, Cong. & Adm. News 351-52.

[90] *Id.* at 19, 352 (emphasis supplied).

Unlike the Senate version, the legislative history of the conference bill did not contain explicit endorsement of the guidelines as they were currently promulgated,[91] and the Commission was directed to be "cognizant of past criticism of parole decision making".[92] Moreover, a provision for judicial review of the guidelines themselves was adopted from the House version.

In describing the parole eligibility criteria, the Conference Report stated:

> [I]t is the intent of the conferees that the Parole Commission review and consider both the nature and circumstances of the offense and the history and characteristics of the prisoner . . . the Parole Commission, in making each parole determination shall recognize and make a determination as to the relative severity of the prospective parolee's offense. . . .[93]

The parole decision makers, apparently in each case, must weigh the concepts of general and special deterrence, retribution and punishment, all of

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[91] We understand the conferees' statement, that the statute "removes doubt as to the legality of changes implemented by administrative reorganization, and makes the improvements permanent" *id.* at 20, 353, to refer to an endorsement of the use of guidelines in the context of a decentralized hearing examiner structure, not as an adoption of the substance of the guidelines, or their then-current use. In this regard, we respectfully disagree with the statements in *Banks v. United States*, 553 F.2d 37 (8th Cir. 1977) that the Committee approved the then-current guidelines and that a primary purpose of the PCRA was to reduce sentence disparity. *Cf. Garcia v. United States Bd. of Parole*, 557 F.2d 100 (7th Cir. 1977) (holding Parole Commission authorized by PCRA to take account of offense severity in guidelines, but declining to rule on whether guidelines are consistent with PCRA).

[92] Conference Report at 26, 1976 U.S. Code Cong. & Adm. News 359.

[93] *Id.* at 25, 358.

> which are matters of judgment . . . and come up with determinations of what is meant by "would not depreciate the seriousness of the offense or promote disrespect for the law" that, to the extent possible, are not inconsistent with findings of other parole decisions.[94]

As an example of this process, the conferees postulate a situation in which a public official is convicted of fraud and sentenced to three years imprisonment. In such a case, states the Report, "his release on parole after one year might satisfy the depreciate the seriousness criterion, but the Commission could justify denying release on grounds that such release would promote disrespect for the law."[95]

If Geraghty's description of the effect given the parole guidelines by the Commission is accurate, the Commission in effect is following the views of the Senate version of the PCRA, rather than the policies of the Conference Committee.

According to Geraghty's description, the Commission attempts to eliminate sentence disparity by completely ignoring the length of sentence imposed by the trial judge.[96] This policy would fail to acknowledge

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[94] *Id.* at 26, 358.

[95] *Id.*

[96] *See* Complaint; note 74 *supra; Cf. United States v. Randle,* 408 F. Supp. 5 (N.D. Ill. 1975). ("In effect, the Parole Board has substituted its guidelines for the judgment of the sentencing judge as to the appropriate sentence for a particular defendant.")

that under the Conference version, a leveling of sentence disparity is a by-product of other policies, rather than a goal. In its hypothetical the Conference Committee apparently saw the length of sentence as being a relevant factor. To fail to take account of the length of sentence imposed is thus at odds with the contemplated effect of the legislation. The fact that the pre-PCRA guidelines ignored sentence length is not dispositive since the accompanying regulations at that time explicitly mandated that length of sentence be taken into account in considering deviation from the guidelines.[97]

Similarly, Geraghty alleges that the guidelines were derived by a grouping of offenses into severity levels by the Commission and by subsequently averaging the time customarily served by prisoners in each "level," and that these levels are given controlling effect by the Commission to the exclusion of other factors. Such a process seems significantly different from the contemplation of the conferees that in structuring "*each* parole determination [the Commission] shall make a determination as to the relative severity of the prospective parolees offense."[98] Nor is it consistent with the procedure contemplated in the Committee's hypothetical. And the refusal to incorporate the previous individualized determination by the trial judge would exacerbate this difficulty.

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[97] 40 Fed. Reg. 2331, August 1975.

[98] Conference Report at 25, 1976 U.S. Code Cong. & Adm. News 358. (emphasis added).

Thus, if Geraghty's recapitulation of the function and genesis of the guidelines is supported by the evidence, there are important divergences between the Parole Commission's actions and the intent of Congress in enacting the statutory mandate.

4. *The Question of Constitutionality*

The differences between Congressional intent and the alleged operation of the guidelines also must be viewed against the backdrop of the disparities between the precedures Geraghty describes and the structure of the balance of the criminal justice system. To the extent that the Parole Commission makes individual judgments about the relative culpability of prisoners and the length of imprisonment proper to vindicate the needs of society yet fails to take account of the sentence imposed by the court, the Commission embarks, alone, on a task which is the traditional province of the judiciary. Insofar as the Commission attempts to make general rules as to the appropriate punishment for crimes which effectively bind parole decisions in all cases, it undertakes functions which are usually discharged by the legislature. Yet the Commission lacks the institutional safeguards of either the courts or the Congress: it has neither judicial independence and allegiance to the ideal of dispassionate and reasoned decisions nor legislative responsiveness to the popular will.

Such tensions and the accompanying constitutional doubts that they raise need not be resolved or cast a

shadow on the validity of the PCRA, of course, unless Congress has clearly authorized the assumption by the Commission of judicial and legislative functions.[99] In light of the legislative history discussed above, we find no such clear authorization in the PCRA.

(a) *Tensions with the Judiciary*

Federal criminal statutes generally provide a range of penalties from which the sentencing court must choose. In making such choices the federal courts draw on the perception that "For the determination of sentences, justice generally requires consideration of more than the particular act by which the crime was committed, and that there be taken into account the characteristics and propensities of the individual." [100] The Supreme Court has recognized that "[t]he belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." [101]

District courts may exercise their discretion in individual cases largely untrammeled by appellate re-

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[99] *See National Cable Television Assn., Inc. v. United States*, 415 U.S. 336 (1974).

[100] *Woodson v. North Carolina*, 428 U.S. 281, 304 (1976) (plurality opinion of Justices Stevens, Stewart and Powell) (quoting *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) as characterizing "prevailing practice."). *See also Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (plurality opinion of Justices Stevens, Stewart and Powell).

[101] *Williams v. New York*, 337 U.S. 241, 247 (1949); *see Chaffin v. Stynchcombe*, 412 U.S. 17, 21-22 (1973).

view.[102] They are not free, however, to eschew the task they are called upon to perform by adopting rules to fix given punishments on given classes of offenders. Such a position by the sentencing judge would constitute an abuse of discretion calling for a vacation of the sentence imposed.[103]

If the PCRA provided for the guidelines to function as Geraghty alleges, a federal defendant would find himself in the anomalous situation of being sentenced by a judge who is forbidden to utilize fixed penalties, but having parole granted by a Commission that is required to use such penalties and which, at the same time, refuses to take account of the decision of the sentencing court. The rigid categories called for by the parole guidelines would frequently nullify the discretion which the trial judges are required to

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[102] *Dorszynski v. United States*, 418 U.S. 424 (1974); *Gore v. United States*, 357 U.S. 386, 393 (1958); *United States v. Bazzano*, No. 76-2584 slip op. at 18-19 (3d Cir. 1977) (Adams, J. concurring).

[103] *See e.g. United States v. Negron*, 548 F.2d 1085, 1087 (2d Cir. 1977); *cert. denied* — U.S. —, *United States v. Foss*, 501 F.2d 522 (1st Cir. 1974); *United States v. Schwartz*, 500 F.2d 350 (2d Cir. 1974); *Woolsey v. United States*, 478 F.2d 139 (8th Cir. 1973) (*en banc*); *United States v. Hartford*, 489 F.2d 652 (5th Cir. 1974); *United States v. Charles*, 460 F.2d 1093 (6th Cir. 1972); *United States v. Baker*, 487 F.2d 360 (2d Cir. 1973); *United States v. Daniels*, 446 F.2d 967 (6th Cir. 1971); *United States v. McCoy*, 429 F.2d 739 (D.C. Cir. 1970); *Cf. United States v. Thompson*, 483 F.2d 527 (3d Cir. 1973) *cert. denied* 417 U.S. 911 (1974) (disqualifying judge because of "fixed view" that draft offenders must serve 30 months); *United States v. Townsend*, 478 F.2d 1072 (3d Cir. 1972) (semble). While this rule has been attributed to "enlightened policy rather than constitutional imperative", *Woodson*, 428 U.S. 280, 303-305 (1976), it has been argued that in situations where grave constitutional interests are at stake, "structural due process" requires individualized decision making. *See* Tribe, *Structural Due Process*, 10 Harv. Civ. Rts.-Civ. Lib. L. Rev. 269 (1975); *Crawford v. Cushman*, 531 F.2d 1114, 1125 (2d Cir. 1976).

exercise in evaluating each case on its individual merits.

It may well be that Congress itself could foreclose all sentencing options.[104] But, absent a clear statement of such a purpose, we should be wary of attributing to Congress the intent to allow the Parole Commission to undertake such a wide-ranging overhaul of the criminal sentencing process.

This is particularly so in view of the fact that the Commission has disclaimed any intention of giving rehabilitation a major role in its parole decisions.[105] Parole has traditionally been conceived of as "an established variation on imprisonment of convicted criminals [whose] purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able."[106] For such a purpose, the Commission, which can observe the prisoner during incarceration, has a significant advantage over the court in determining eligibility for parole under a standard which is distinct from the traditional role of the judiciary.[107] When, however, the parole author-

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[104] *See Marshall v. United States*, 414 U.S. 417 (1974) (upholding statute which denies drug rehabilitation sentence to two-time felons).

[105] C.F.R. 41329-30 (Sept. 5, 1975).

[106] *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972). *See Gagnon v. Scappareli*, 411 U.S. 778, 785 (1973) ("the rehabilitative rather than punitive focus of the parole/probation system"); *Zerbst v. Kidwell*, 304 U.S. 359, 363 (1938) ("a means of restoring offenders who are good social risks to society").

[107] *Cf. United States v. Murray*, 275 U.S. 347 (1927) ("The parole statute provides a board to be invested with full opportunity to watch the conduct of penitentiary convicts.")

ity focuses consideration entirely on factors of deterrence, incapacitation and retribution, it takes into account almost exclusively the very factors that are available to the sentencing judge. The Commission then begins to perform functions which are within the traditional province of the judiciary.[108] At least where the prior determination of the judicial branch are given no weight, therefore, serious questions are raised whether the constitutional protections provided by an independent judiciary are being undermined.[109] Since Congress has manifested no clear intention to raise such questions, we do not interpret the PCRA as authorizing such disregard of judicial sentences.[110]

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108 *See, Ex Parte United States*, 242 U.S. 27, 41 (1916) ("indisputably, under our constitutional system, the right to try offenses against the criminal laws and upon conviction to impose the punishment provided by law is judicial"); Yale Note *supra* note 2, at 892-893; *cf. Wong Wing v. United States*, 163 U.S. 228 (1896) (penalty of "hard labor" is an infamous punishment and therefore cannot be administratively imposed). *North Carolina v. Russell*, 427 U.S. 328 (1976) (criminal trial before non-law trained judge is constitutional if trial *de novo* is available).

In view of this alteration in functions, prior cases upholding the federal parole statute against challenges based on alleged usurpation of judicial functions would not seem dispositive. *E.g. Sims v. Rives*, 84 F.2d 871, 879 (D.C. Cir. 1936); *see Commonwealth ex rel. Banks v. Cain*, 345 Pa. 581, 28 A.2d 897, 143 A.L.R. 1973 (1942); Annotation, 143 A.L.R. 1726 (1942). *Cf. Dreyer v. Illinois*, 187 U.S. 71, 78-84 (1902) (Illinois indeterminate sentence act did not violate due process by vesting parole power in executive).

109 *See United States v. Brown*, 381 U.S. 437, 441-447 (1965) (separation of powers is at the root of Bill of Attainder clause, and "the legislative branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of and levying appropriate punishment upon specific persons").

110 *Cf. Duncan v. Kahanamoku*, 327 U.S. 304 (1946) (since Congress "did not explicitly declare" civil courts supplanted under martial law statute, Court rejected such authority in light of "principles and practices developed during the birth and growth of our political institutions."); *Soloway v.*

(b) *Delegation of Legislative Functions*

The determination of the proper range of punishment which may be levied in regard to a class of crimes, like the determination of what actions are criminal, is within the ambit of the legislative prerogative.[111] "Because of the seriousness of criminal penalties," they should in general attach only after the body responsible for forming our laws in the first in-

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110. (Cont'd.)

Weger, 389 F. Supp. 409, 411 (W.D. Pa. 1974) ("blind adherence" to guidelines "may well be" intrusion into court's sentencing role in excess of statutorily conferred powers of Parole Board); Kastenmeir & Eglit, *Parole Release Decision-Making; Rehabilitation, Expertise and the Demise of Mythology*, 22 Am. U. L. Rev. 477, 494, 495, 508, 522 (1973) (questioning assumption by Parole Board of judicial role of evaluating severity of offense in absence of legislative authorization). *See generally* Gewirtz, *The Courts, Congress, and Executive Policy Making; Notes on Three Doctrines, 1976, Law and Cont. Prob.* 46. *But cf. Wiley v. United States Bd. of Parole*, 380 F. Supp. 1194, 1196-97 (M.D. Pa. 1974) (upholding guidelines against challenge that they amounted to "resentences"); *Manos v. United States Board of Parole*, 399 F. Supp. 1103, 1105 (M.D. Pa. 1975) (guidelines are "constitutional"). *Garcia v. United States Bd. of Parole*, 409 F. Supp. 1230, 1238-39 (N.D. filed 1976) *revd on other grounds*, 557 F.2d 100 (1972) (holding guidelines are not "usurpation" of sentencing function).

111 *See United States v. Bass*, 404 U.S. 336, 348 (1971) ("Because of the seriousness of penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity"); *Bell v. United States*, 349 U.S. 81, 89 (1955) ("The punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress"); *Ex Parte Grossman*, 267 U.S. 87 (1925) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it" before it may be punished); *Ex Parte United States*, 242 U.S. 27, 42 (1916) ("indisputab'e also is that the authority to define and fix the punishment of a crime is legislative"); *United States v. Wiltberger*, 18 U.S. [5 Wheat] 35, 43 (1820) ("the plain principle that the power of punishment is vested in the legislative not in the judicial department. It is the legislature not the court which is to define a crime and ordain its punishment"); *Schick v. Reed*, 419 U.S. 256, 274-76 (1974) ("Prescribing punishment is a prerogative reserved for the lawmaking branch of government, the legislature") (Marshall, J. dissenting).

stance has established that such penalties are appropriate.[112] Criminal sanctions serve an amalgam of social goals, and their severity is best determined by a body which can respond to the balance of such goals as prescribed by the popular will.[113]

If the parole guidelines function as automatically as Geraghty alleges that they do, the Commission is effectively redrafting the penalty provisions of the United States criminal code.[114] The severity levels of the guidelines neither "fill in the details" of an otherwise complete statutory scheme,[115] nor perform a new

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[112] *United States v. Bass*, 404 U.S. 346, 348 (1971). *Cf. Gutknecht v. United States*, 396 U.S. 295 (1970) (draft board is not authorized to punitively induct registrant who turned in registration card).

Unlike the case of *Schick v. Reed*, 419 U.S. 256 (1974), in which the Court upheld the imposition of conditions in connection with a presidential pardon, the parole board's authority does not find its roots in the pardoning powers of Article II, but in specific legislative delegation. In 1927, seventeen years after the enactment of the federal parole statute, the Supreme Court undertook to survey the various forms of reduction of sentence available to prisoners. *United States v. Murray*, 275 U.S. 347 (1927) (construing probation act). It discerned "three different methods of mitigation:" the judicial probation authority granted by statute; "clemency by the President under the Constitution;" and "the power of parole by a Board of Parole abating judicial punishment."

[113] *See Yale Note supra* note 2 at 888.

[114] In 41 Fed. Reg. 37316 (3 Sept. 1976), for example, the offense severity for immigration law violators was augmented as a result of the "Commission's concern with the increasing numbers of immigration law violators in recent years." Such a judgment appears to be one that is appropriate in the first instance for the Congress.

[115] It is clear that the "severity levels" in the parole guidelines do not correspond to the maximum punishments provided by Congress. While uttering a counterfeit note carries a statutory maximum of 15 years (18 U.S.C. § 472 (1970)), if the currency passed does not exceed $1,000, the Commission classes the offense as "low moderate." In contrast, mailing an anonymous threat to property, a violation whose statutory penalty is 2 years in jail (18 U.S.C. § 876

administrative function necessitated by novel regulatory legislation.

Whether or not federal criminal penalties should be redrafted[116] it is of dubious constitutional propriety to delegate so crucial a legislative function to a non-representative body with no standards other than a direction that the results "not depreciate the seriousness of the offense" and "be consistent with the public welfare." Accordingly, we decline to read such a delegation into the PCRA.[117]

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115. (Cont'd.)

(1970)), is classified as "moderate" severity, requiring a longer sentence to be served before parole.

Illegally selling alcohol in the vicinity of Indian schools (18 U.S.C. § 1154 (1970) and violation of the Mann Act (18 U.S.C. § 2421 et seq. (1970)) are classified as "low moderate" and "high" severity crimes respectively, despite the fact that they carry identical 5 year penalties. Misprision of a felony, (18 U.S.C. § 4 (1970)) and extortion by a United States employee (18 U.S.C. § 872 (1970)) are each punishable by a maximum of 3 years imprisonment, yet the former is rated as a "moderately" severe crime, and the latter is determined to be of "very high" severity. Both carry lighter sentences than the Selective Service violations (50 App. U.S.C. § 462 (repealed) (5 year penalty)) which the Commission treats as "low-moderate" severity.

[116] *Cf.* Senate Bill 1437, 95th Cong. 1st Sess. (1977), Reported S. Rept. 95-605, 123 Cong. Rec. S 19037 (daily ed. Nov. 15, 1977) (providing for comprehensive code of criminal penalties and sentence review). Since S. 1437 would also largely eliminate parole, many of the difficulties raised by the Parole Commission's *modus operandi* would, if S. 1437 is enacted, become truly moot.

[117] *See National Cable Television Assn. v. United States*, 415 U.S. 336 (1974) (statute should not be construed to delegate taxing power without appropriate standards); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting) (statute should not be read to delegate power to allocate water without appropriate standards); *L. Tribe, American Constitutional Law* § 15-17, 284-291 (1978); *Gewirtz, supra* note 110, Wright, *Book Review, Beyond Discretionary Justice*, 81 Yale L.J. 575, 580, 582-87 (1972) (Wright, J.); Freedman, *Review, Delegation of Power and Institutional Competence*, 43 U. Chi. L. Rev. 307 (1976).

This is not, of course, to say that no guidelines of any sort may issue under the PCRA, for some guidelines were clearly intended. Indeed such guidelines may constitute a laudable means of avoiding arbitrary decision-making. Issues of separation of powers involve subtle inquiries, sensitive to the precise dimensions of the power being exercised. Thus, if the guidelines function as the Commission contends, guiding but not controlling discretion, a different issue would be presented. They would then partake less of the character of fixed penalties than if Geraghty is correct, and would perform functions less like those of legislation. And guidelines which use the actual sentence imposed as a starting point would be akin to the exercise of sentencing discretion which the Congress may validly delegate to the courts. Such questions, however, may be disposed of only on a full record setting forth the actual functioning of the guidelines.

B. *Ex Post Facto Effect of the Guidelines*

At the time he was sentenced in the late summer of 1973, Geraghty was eligible for parole as soon as he was incarcerated.[118] The grant or denial of parole, according to the then-current statute, was to result from a determination by the Board whether: (a) there is reasonable probability that the prisoner will live and remain at liberty without violating the laws;

[118] Since Geraghty was sentenced under 18 U.S.C. § 4208(a)(2) (1970), he became eligible for parole immediately upon incarceration.

and (b) such release in the opinion of the Board is not incompatible with the welfare of society.[119]

At the time of his first parole hearing, guidelines adopted by the Commission subsequent to Geraghty's sentence established a "customary time to be served before release" of 26-36 months for prisoners who had committed crimes as "severe" as the one for which Geraghty was convicted. And, claims Geraghty, less than one prisoner in ten is paroled before his "customary release date."[120] Consequently, Geraghty challenges the application of the parole guidelines to him, and others similarly situated, as constitutionally forbidden *ex post facto* laws.

1. *Outlines of Ex Post Facto Prohibition*

By the time of the American Revolution, Blackstone had classed *ex post facto* laws with those of Caligula: "all punishment [for violating them] must be cruel and unjust."[121] In response to similar sentiments, as well as recent experience with oppressive *ex post facto* laws,[122] the framers of the Constitution considered the necessity of guarding against such excesses strongly enough to include within the Constitution two prohibitions against *ex post facto* laws.[123]

[119] 18 U.S.C. § 4203 (1970).

[120] Defendants Answer to Complaint ¶ 48. A39.

[121] 1 W. Blackstone, Commentaries *46.

[122] *See* Crosskey, *The True Meaning of the Constitutional Prohibition of Ex Post Facto Laws*, 14 U. Chi. L. Rev. 539 (1947); Note, *Ex Post Facto Limitations on Legislative Power*, 73 Mich. 1491, 1500-01 (1975).

[123] Art. I § 9 and § 10. For an excellent recent analysis of the *ex post facto* clause, see *Tribe, supra* note 117, 474-484 §§ 10-1-10-3.

These "bulwarks in favor of the personal security of the subject" were early read to be exclusively limitations on the exercise of the power to punish crimes.[124] According to the celebrated case of *Calder v. Bull,* the interdiction included laws "aggravating a crime or mak[ing] it greater than it was, when committed" and laws "chang[ing] the punishment, and inflict[ing] a greater punishment than the law annexed to the crime, when committed."[125]

But within the criminal sphere, the Supreme Court opted for a broad reading of the proscriptions: the definition of *Calder* was not exclusive, but merely indicative. Any law

> passed after the commission of an offense which . . . 'in relation to that offense or its consequences alters the position of a party to his disadvantage' is an *ex post facto* law.[126]

Such alteration has been held to include not only liability for greater penalties, but aggravation of the conditions of the punishment imposed.[127] The test is

[124] *Calder v. Bull,* 3 U.S. (3 Dallas) 385, 390 (1798) (opinion of Chase, J.). *See United States Trust v. New Jersey,* 45 U.S.L.W. 4418, 4422 n.13 (1977).

[125] *Calder v. Bull,* 3 U.S. [3 Dallas] at 390.

[126] *Kring v. Missouri,* 107 U.S. 221, 235 (1882) *quoting United States v. Hill,* 2 Wash. 366, *aff'd* 10 U.S. [6 Cranch] 171 (1810) (repeal of provision that conviction of second degree murder operated as acquittal of first degree murder). The court in *Kring* went on to say: "No one can be criminally punished in this country except according to a law prescribed for his government by the sovereign authorities before the imputed offense was committed, and which existed as a law at that time."

[127] *In re Medley,* 134 U.S. 160 (1890) (new law mandating convicted murderer be kept in solitary confinement until execution and that warden should set date of execution without informing prisoner violated *ex post facto* clause).

not whether the punishment actually received is within the outer limits of the law at the time the crime was committed, but whether "the later standard of punishment is more onerous than the earlier."[128]

Thus, in *Lindsey v. Washington,* the Supreme Court held that a statute which altered a criminal penalty from a 1 to 15-year sentence to a 15-year indeterminate sentence with possibility of parole operated as an *ex post facto* law when applied to a crime which had taken place before the amendment. The Court said:

> It is true that petitioner might have been sentenced to 15 years under the old statute. But the ex post facto clause looks to the standard of punishment prescribed by the statute rather than to the actual punishment imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated to the detriment or material disadvantage of a wrongdoer. [citations omitted] It is for this reason that an increase in the possible penalty is *ex post facto* [citations omitted] . . . regardless of the length of the penalty actually imposed. . . .
>
> We need not inquire whether this is technically an increase in the punishment annexed to the crime, *See Calder v. Bull* at 390. It is plainly to the substantial disadvantage of the petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from cus-

[128] *Lindsey v. Washington,* 301 U.S. 397, 400 (1937).

tody and control prior to the expiration of their 15 year term.[129]

2. *Ex Post Facto and Parole*

The plaintiff in this case had no more guarantee of receiving parole before his "customary release date" than did the petitioners in *Lindsey* of receiving less than a maximum sentence. Like the adoption of mandatory 15 year sentence in *Lindsey,* however, the promulgation of a 26 month "customary release date" deprived Geraghty of the possibility of a substantially more lenient punishment. The similarity between Geraghty's position and that of the petitioners in *Lindsey* elicits concern whether the guidelines are at odds with the *ex post facto* prohibition. Our doubts are heightened by the two Supreme Court determinations which have touched upon the subject of parole and the *ex post facto* clause.

In *Warden v. Marrero,*[130] the Court held that for purposes of a repeal of a statute barring parole for drug offenders, parole eligibility is effectively determined at the time of sentencing, and that therefore eligibility for parole is part of the "punishment" within the meaning of the statute.[131] The Court, however, gave two additional reasons for treating parole eligibility as part of the punishment:

> First, only an unusual prisoner could be expected to think that he was not suffering a penalty when he was denied eligibility for parole. [citations omitted] For the convicted prisoner, parole—even with its legal constraints—is a long step toward regaining freedom. . . .
>
> Second, a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *ex post facto* clause of Art. I § 9 cl. 3 of the Constitution, of whether it imposed "greater or more severe *punishment* than was prescribed by law at the time of the . . . offense." [citations omitted][132]

Similarly, in *Greenfield v. Scafati,*[133] a three-judge court struck down a statute depriving parole violators of accumulated good time upon their return to prison, as applied to a prisoner who had been sentenced before the law went into effect. Since the possible loss of good time for parole violation was in effect a potential lengthening of the sentence, the Court held that imposition of such a penalty with respect to the petitioner was an impermissible *ex post facto* law. In response to the argument that the plaintiff had, by his

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[129] *Lindsey* was recently interpreted in *Dobbert v. Florida,* 45 U.S.L.W. 4721, 4726 (1977) as holding that "one is not barred from challenging a change in the penal code on *ex post facto* grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old."

[130] 417 U.S. 653 (1974).

[131] 417 U.S. at 658-661.

[132] 417 U.S. at 662-63.

[133] 277 F. Supp. 644 (D. Mass. 1967) *aff'd* 390 U.S. 713 (1968).

acceptance of parole, acceded to the condition, the Court declared:

> [W]e see no distinction between depriving a prisoner of the right to earn good conduct deductions and the right to qualify for, and hence earn, parole. Each, to quote *In re Medley, supra,* "materially alters the situation of the accused to his disadvantage." [134]

Thus, the Court held, imposing the risk of loss of good time as a condition for parole violated the *ex post facto* prohibition. The Supreme Court affirmed without opinion.[135]

In light of *Marrero* and *Scafati,* along with the *ex post facto* decisions canvassed earlier, we conclude that were a statute to deprive already incarcerated or sentenced prisoners of the possibility of parole for the first 26 months of their sentence, when such was not the situation at the time of the sentence, that statute would be unconstitutional.[136]

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[134] 277 F. Supp. at 646.

[135] 390 U.S. 713 (1968).

[136] This Court held in *U.S. ex rel. Forino v. Garfinkel,* 166 F.2d 887 (1948) that repeal of a provision removing civil disabilities upon completion of a sentence was not an *ex post facto* law. This holding has been substantially undercut by the Supreme Court's affirmance of *Scafati.* It has also been rendered inapplicable to this case by the recognition of parole and good time as protected liberty interests. *Morrissey v. Brewer,* 408 U.S. 471 (1972) and *Wolff v. McDonnell,* 418 U.S. 539 (1974).

We likewise decline to follow, and question the continued viability of *Singleton v. Shafer,* 313 F. Supp. 1094 (E.D. Pa. 1970) (repeal of good time statute not *ex post facto*) and *Graham v. Thompson,* 246 F.2d 805 (10th Cir. 1957) (repeal of good time statute not *ex post facto,* resting on interpretation of Utah law).

The two courts of appeals which have considered the retroactive effect of the parole guidelines have reached conclusions similar to the ones thus far articulated. In *Shepard v. Taylor,*[137] the court considered the applicability of the parole guidelines to prisoners sentenced under the Youth Corrections Act. Judge Kaufman held that "official post-sentence action that delays eligibility for supervised release runs afoul of the *ex post facto* proscription." [138] Since the parole guidelines give substantial weight to offense severity, a factor which had been excluded from a decision to release under the Youth Corrections Act as it read at the time of sentencing, the Court determined that application of the guidelines to prisoners incarcerated under the original Youth Corrections Act would be unconstitutional. Likewise, in *Ruip v. United States,*[139] the court held that "In any practical analysis, parole consideration is a part of the new law annexed to the crime." [140]

3. *Ex Post Facto and the Guidelines*

Both *Shepard* and *Ruip,* however, stated that the guidelines could be applied retroactively to adult offenders without trenching upon the *ex post facto* prohibition. This was so, the courts said, since the guide-

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[137] 556 F.2d 648 (2d Cir. 1977).

[138] *Id.* at 654.

[139] 555 F.2d 1331 (6th Cir. 1977).

[140] *Id.* at 1335.

lines "merely clarify the exercise of administrative discretion," [141] and "the commission remains free to make parole decisions outside of these guidelines." [142] We respectfully differ with this conclusion.

From our analysis above, it is clear that the legislature could not retroactively, without offending the *ex post facto* clause of the Constitution, substantially decrease parole eligibility by legislation. We take it that a similar prohibition applies to an increase in punishment brought about by rule-making, the administrative equivalent of legislation.[143] The legislature cannot, by delegation, escape constitutional limitations on its power. And to maintain that the present parole guidelines enact no substantial limitation on parole eligibility may well be to misinterpret both the legal and practical effects of the guidelines.

The legal effects of the guidelines prior to the PCRA were examined in *Pickus v. U.S. Board of Parole*.[144] There, in holding the promulgation of the

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[141] *Shepard v. Taylor*, 556 F.2d at 654 (dictum).

[142] *Ruip v. United States*, 555 F.2d at 1335. *Cf. Milhouse v. Levi*, 548 F.2d 357 (D.C. Cir. 1976) (alteration of eligibility regulations for furlough program not *ex post facto* law since furlough, unlike parole, was not part of the punishment).

[143] *Love v. Fitzharris*, 460 F.2d 382 (9th Cir. 1972) *vacated as moot* 409 U.S. 1100 (1973) (change in administrative interpretation of parole statute). *See Marks v. United States*, 430 U.S. 188, 191 (1977) *quoting Bouie v. Columbia*, 378 U.S. 347 (1964) ("If a state legislature is barred by the *ex post facto* clause from passing such a law, it must follow that the state supreme court is barred by due process from achieving the same result by judicial construction.").

[144] 507 F.2d 1107 (D.C. Cir. 1974).

guidelines to be subject to the rule-making provisions of the Administrative Procedure Act, the court explicitly rejected the contention that these guidelines were mere general policy statements. Rather, in comparison with earlier rules which were themselves "calculated to have a substantial impact on ultimate parole decisions," the guidelines "had an even greater impact on an inmate's chances for parole."

> The rules defining parole selection criteria are substantive agency action, for they define a fairly tight framework to circumscribe the Board's statutorily broad power . . . . [T]hey are self-imposed controls over the manner and circumstances in which the agency will exercise its plenary power. They have the force of law.[145]

As previously noted in the legislative history of the PCRA, the joint conference committee explicitly approved "the principles established in *Pickus*" with regard to the nature of the guidelines.[146] Moreover, the PCRA itself empowers the Commission to "grant or deny release on parole notwithstanding the guidelines . . . if it determines there is good cause for so doing." [147] "Good cause," however, according to the legislative history "for purposes of this section, means substantial reason." [148] It appears, therefore, that the

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[145] 507 F.2d 1107 at 1113.

[146] Conference Report at 36, 1976 U.S. Code, Cong. & Adm. News 368.

[147] 18 U.S.C. 4206(c) (1976).

[148] Conference Report at 27, 1976 U.S. Code, Cong. & Adm. News 359.

guidelines are designed to be not mere hortatory "clarifications" of policy, but rules which are to be followed except for "substantial reason" to the contrary. The freedom of the Commission to grant parole prior to the customary release date is constrained, and the "situation" of prisoners otherwise eligible for parole is "altered to their disadvantage."

The *ex post facto* clause, however, reaches beyond mere formal alterations in criminal law.[149] Thus, if in practice the parole authorities found good cause to deviate from the guidelines in 60% of the cases, for example, it might be argued that their discretion is, in fact, unfettered. However, the material which we have before us points in the opposite direction. The Parole Commission's answer to the complaint in this case admits that in 1975 prisoners were granted parole prior to their "customary release dates" in only 8.7% of the cases.[150] Another decision of this Court took judicial notice of estimates of compliance with the guidelines ranging from 88% to 94%.[151] It thus appears that

[149] *See Warden v. Marrero*, 417 U.S. 653, 663 (1974) (examining "practical effect" of parole limitations); *Dobbert v. Florida*, 45 U.S.L.W. 4721, 4725 (1977) ("We must compare the two procedures in toto to determine if the new may be fairly characterized as more onerous"); *Beazell v. Ohio*, 269 U.S. 167, 170 (1925) ("Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation."); *In Re Medley*, 134 U.S. 160, 167-73 (1890) (analyzing practical effect of solitary confinement as increasing severity of punishment).

[150] Defendant's answer to ¶ 48. A39.

[151] *United States v. Salerno*, 538 F.2d 1005, 1008 (1970). *See* Yale Note *supra* note 2, at 825 n.75, 869 n.293; *United States v. Solly*, 559 F.2d 230, 233 (3d Cir. 1977).

the "channel for discretion" provided by the guidelines is in actuality an unyielding conduit.

Nonetheless, since the Commission intimates elsewhere in its answer that, in fact, it engages in individualized consideration of prisoners similar to that which it undertook before the guidelines went into effect, there appears to be a controverted issue of material fact, and on such issue, the case is inappropriate for summary judgment.

IV. Conclusion

(1) The federal courts have jurisdiction over the complaint filed by Geraghty since the suit was properly brought as an action for declaratory judgment under the APA and the PCRA.

(2) If the class certification was improperly denied, a live legal controversy still exists despite Geraghty's release, and the action is not moot.

(3) It was error for the trial court to fail to consider the possibility of creating subclasses out of the over-inclusive and heterogeneous classes specified by the plaintiff, and therefore the case must be remanded to the trial court to evaluate the possibility of creating subclasses.[152]

(4) The substantive claims set forth in the complaint were not properly subject to dismissal by sum-

[152] The trial court should also examine the continued ability of Geraghty's counsel to represent such sub-classes adequately.

mary judgment. Plaintiff's contentions are supported by allegations sufficient to raise genuine issues of fact, and, if the averments are accurate, the parole guidelines as administered may well be inconsistent with the PCRA, and the parole guidelines as applied to certain prisoners may violate the *ex post facto* prohibition.

(5) If on remand the trial court determines that a proper class action should be maintained, factual support for the plaintiff's allegations regarding the operation of the parole system must be fully developed, and the Commission should have ample opportunity to establish the authenticity of its version of the operation of the guidelines.

The case will be reversed and remanded for action in accordance with this opinion.

GUIDELINES FOR DECISIONMAKING

[Customary total time to be served before release (including jail time)]

Offense characteristics—severity of offense behavior (examples)	Offender characteristics—parole prognosis (salient factor score) (in months)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
Adult				
Low:				
Escape (open institution or program (e.g., CTC, work release)—absent less than 7 d). Marihuana or soft drugs, simple possession (small quantity for own use). Property offenses (theft or simple possession of stolen property) less than $1,000.	6-10	8-12	10-14	12-18
Low moderate:				
Alcohol law violations Counterfeit currency (passing/possession less than $1,000) Immigration law violations Income tax evasion (less than $10,000) Property offenses (forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than $1,000. Selective Service Act violations	8-12	12-16	16-20	20-26
Moderate:				
Bribery of a public official (offering or accepting) Counterfeit currency (passing/possession $1,000 to $19,999) Drugs: Marihuana, possession with intent to distribute/sale (small scale (e.g., less than 50 lb)). "Soft drugs," possession with intent to distribute/sale (less than $500). Escape (secure program or institution, or absent 7 d or more—no fear or threat used). Firearms Act, possession/purchase/sale (single weapon: not sawed-off shotgun or machine gun).	12-16	16-20	20-24	24-32

Offense characteristics—severity of offense behavior (examples)	Offender characteristics—parole prognosis (salient factor score) (in months)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
Moderate Cont'd.				
Income tax evasion ($10,000 to $50,000) Mailing threatening communication(s) Misprison of felony Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) $1,000 to $19,999. Smuggling/transportation of alien(s) Theft of motor vehicle (not multiple theft for resale)	12-16	16-20	20-24	24-32
High:				
Counterfeit currency (passing/possession $20,000 to $100,000) Counterfeiting (manufacturing) Drugs: Marihuana, possession with intent to distribute/sale (medium scale (e.g., 50 to 1,999 lbs)). "Soft drugs", possession with intent to distribute/sale ($500 to $5,000) Explosives, possession/transportation Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons). Mann Act (no force—commercial purposes) Theft of motor vehicle for resale Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) $20,000 to $100,000.	16-20	20-26	26-34	34-44

Offense characteristics—severity of offense behavior (examples)	Offender characteristics—parole prognosis (salient factor score) (in months)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
Very high:				
Robbery (weapon or threat) Breaking and entering (bank or post office-entry or attempted entry to vault) Drugs: Marihuana, possession with intent to distribute/sale (large scale (e.g., 2,000 lb or more)). "Soft drugs", possession with intent to distribute/sale (over $5,000) "Hard drugs", possession with intent to distribute/sale (not exceeding $100,000).	26-36	36-48	48-60	60-72
Extortion Mann Act (force) Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) over $100,000 not not exceeding $500,000. Sexual act (force)	26-36	36-48	48-60	60-72
Greatest:				
Aggravated felony (e.g., robbery, sexual act, aggravated assault)—weapon fired or personal injury. Aircraft hijacking Drugs: "Hard drugs", possession with intent to distribute/sale (in excess of $100,000). Espionage Explosives (detonation) Kidnapping Willful homicide	Greater than above—however, specific ranges are not given due to the limited number of cases and the ext eme variation in severity possible within the category.			

Offense characteristics—severity of offense behavior (examples)	Offender characteristics—parole prognosis (salient factor score) (in months)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
Low:				
Escape (open institution or program (e.g., CTC, work release)—absent less than 7 d).	6-10	8-12	10-14	12-18
Marihuana or soft drugs, simple possession (small quantity for own use).				
Property offenses (theft or simple possession of stolen property) less than $1,000.				
Low moderate:				
Alcohol law violations	8-12	12-16	16-20	20-26
Counterfeit currency (passing/possession less than $1,000)				
Immigration law violations				
Income tax evasion (less than $10,000)				
Property offenses (forgery/fraud/theft from mail/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property with intent to resell) less than $1,000.				
Selective Service Act violations				
Moderate:				
Bribery of a public official (offering or accepting)	9-13	13-17	17-21	21-28
Counterfeit currency (passing/possession $1,000 to $19,999)				
Drugs:				
Marihuana, possession with intent to distribute/sale (small scale (e.g., less than 50 lb)).				
"Soft drugs," possession with intent to distribute/sale (less than $500).				
Escape (secure program or institution, or absent 7 d or more—no fear or threat used).				
Firearms Act, possession/purchase/sale (single weapon: not sawed-off shotgun or machine gun).				
Income tax evasion ($10,000 to $50,000)				
Mailing threatening communication(s)				
Misprison of felony				
Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) $1,000 to $19,999.				
Smuggling/transportation of alien(s)				
Theft of motor vehicle (not multiple theft for resale)				
High:				
Counterfeit currency (passing/possession $20,000 to $100,000)	12-16	16-20	20-26	26-32
Counterfeiting (manufacturing)				
Drugs:				
Marihuana, possession with intent to distribute/sale (medium scale (e.g., 50 to 1,999 lbs)).				
"Soft drugs", possession with intent to distribute/sale ($500 to $5,000)				
Explosives, possession/transportation				
Firearms Act, possession/purchase/sale (sawed-off shotgun(s), machine gun(s), or multiple weapons).				
Mann Act (no force—commercial purposes)				
Theft of motor vehicle for resale				
Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) $20,000 to $100,000.				
Very high:				
Robbery (weapon or threat)	20-27	27-34	34-41	41-48
Breaking and entering (bank or post office-entry or attempted entry to vault)				
Drugs:				
Marihuana, possession with intent to distribute/sale (large scale (e.g., 2,000 lb or more)).				
"Soft drugs", possession with intent to distribute/sale (over $5,000)				
"Hard drugs", possession with intent to distribute/sale (not exceeding $100,000).				
Extortion				
Mann Act (force)				
Property offenses (theft/forgery/fraud/embezzlement/interstate transportation of stolen or forged securities/receiving stolen property) over $100,000 not not exceeding $500,000.				
Sexual act (force)				

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71a

Offense characteristics—severity of offense behavior (examples)	Offender characteristics—parole prognosis (salient factor score) (in months)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
Greatest:				
Aggravated felony (e.g., robbery, sexual act, aggravated assault)—weapon fired or personal injury. Aircraft hijacking Drugs: "Hard drugs", possession with intent to distribute/sale (in excess of $100,000). Espionage Explosives (detonation) Kidnapping Willful homicide	Greater than above—however, specific ranges are not given due to the limited number of cases and the ext eme variation in severity possible within the category.			

NOTES.—1. These guidelines are predicated upon good institutional conduct and program performance.

2. If an offense behavior is not listed above, the proper category may be obtained by comparing the severity of the offense behavior with those of similar offense behaviors listed.

3. If an offense behavior can be classified under more than 1 category, the most serious applicable category is to be used.

4. If an offense behavior involved multiple separate offenses, the severity level may be increased.

5. If a continuance is to be given, allow 30 d (1 mo) for release program provision.

6. "Hard drugs" include heroin, cocaine, morphine, or opiate derivatives, and synthetic opiate substitutes. "Soft drugs" include, but are not limited to, barbiturates, amphetamines, LSD, and hashish.

7. Conspiracy shall be rated for guideline purposes according to the underlying offense behavior if such behavior was consummated. If the offense is unconsummated, the conspiracy will be rated one step below the consummated offense.

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SALIENT FACTOR SCORE

Case name ..... Register No. ..... ☐

Item A ..... ☐

No prior convictions (adult or juvenile)=3.
1 prior conviction=2.
2 or 3 prior convictions=1.
4 or more prior convictions=0.

Item B ..... ☐

No prior incarcerations (adult or juvenile)=2.
1 or 2 prior incarcerations=1.
3 or more prior incarcerations=0.

Item C ..... ☐

Age at first commitment (adult or juvenile):
26 or older=2.
18 to 25=1.
17 or younger=0.

Item D ..... ☐

Commitment offense did not involve auto theft or check(s) (forgery/larceny)=1.
Commitment offense involved auto theft or check(s)=0.

Item E ..... ☐

Never had parole revoked or been committed for a new offense while on parole, and not a probation violator this time=1.
Has had parole revoked or been committed for a new offense while on parole, or is a probation violator this time=0.

Item F ..... ☐

No history of heroin or opiate dependence=1.
Otherwise=0.

Item G ..... ☐

Verified employment (or full-time school attendance) for a total of at least 6 mo during the last 2 yr in the community=1.
Otherwise=0.

Total score ..... ☐

73a

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1679 and 77-1858

JOHN M. GERAGHTY, indiv. and on
behalf of a class

vs.

UNITED STATES PAROLE COMMISSION
and
ATTORNEY GENERAL OF UNITED STATES
and
SUPERINTENDENT FEDERAL PRISON
Allenwood, Pa.

GERAGHTY, JOHN M., indiv. and on behalf of a class, Appellant in No. 77-1679

ELIEZER BECHER,
Appellant in No. 77-1858
(D. C. Civil No. 76-1467)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Present: ADAMS and GARTH, *Circuit Judges* and
LACEY, *District Judge**

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* United States District Judge for the District of New Jersey, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel on October 21, 1977.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, filed February 24, 1977, and appealed at our No. 77-1679, and the order of the said District Court, filed May 11, 1977 and appealed at our No. 77-1858, be, and the same are hereby reversed and the cause remanded for action in accordance with the opinion of this Court. Costs taxed in favor of appellant in No. 77-1679 only.

ATTEST:

/s/ THOMAS F. QUINN
Clerk

March 9, 1978

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1679, 77-1858

JOHN M. GERAGHTY, etc.

v.

UNITED STATES PAROLE COMMISSION, et al.,
Appellees

Geraghty, appellant in 77-1679
Becher, appellant in 77-1858

SUR PETITION FOR REHEARING
EN BANC

Present: SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges.*

The petition for rehearing filed by Appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
/s/ ARLEN M. ADAMS
Circuit Judge

Dated: May 8, 1978

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

John M. GERAGHTY, Individually and on behalf of a class, Petitioner,

v.

UNITED STATES PAROLE COMMISSION, et al., Respondents.

Civ. No. 76-1467.

[Filed Feb. 24, 1977.]

MEMORANDUM

HERMAN, District Judge.

Petitioner, John M. Geraghty, is presently an inmate at the Federal Community Treatment Center, Chicago, Illinois,[1] serving a 30 month sentence[2] imposed by the United States District Court for the Northern District of Illinois for the offenses of conspiracy to commit extortion, 18 U.S.C. § 1951, and false declarations to a grand jury, 18 U.S.C. § 1623. On appeal, petitioner's conviction was affirmed. *United States v. Braasch,* 505 F.2d 139 (7th Cir.

[1] At the time the petition was filed and at the time the action was transferred to this district, petitioner was an inmate at the Allenwood Federal Prison Camp, Montgomery, Pennsylvania.

[2] Petitioner was initially sentenced to a term of 48 months. This sentence was reduced to 30 months in a proceeding under Rule 35 of the Federal Rules of Criminal Procedure, 18 U.S.C. *United States v. Braasch,* No. 72 CR 979 (N.D. Ill., Oct. 9, 1975), aff'd., 542 F.2d 442 (7th Cir. 1976). Petitioner's motion for further relief pursuant to 28 U.S.C. § 2255 was denied on December 21, 1976. *Geraghty v. United States,* No. 76 C 4215 (N.D.Ill.).

1974). Certiorari was denied by the United States Supreme Court, 421 U.S. 910 (1975).

On September 15, 1976, petitioner, through retained counsel, filed this action in the United States District Court for the District of Columbia. By order dated November 12, 1976, the Honorable Joseph C. Waddy construed the action as a petition for a writ of habeas corpus and transferred the action to this Court. This Court issued a rule to show cause (Document 5, filed December 7, 1976) in response to which respondent has filed a motion for summary judgment and a brief in support thereof. Respondent has opposed petitioner's motion for summary judgment. Because the issues presented are issues of law, no evidentiary hearing is required. 28 U.S.C. § 2243; *deVyver v. Warden, U. S. Penitentiary,* 388 F.Supp. 1213 (M.D.Pa.1974). Thus, the case is ripe for disposition.

The substantive issues raised by Geraghty's petition concern the decision of the United States Parole Commission not to release him on parole. From the record before the Court, it appears that in June 1976, petitioner was considered for parole. 28 C.F.R. § 2.14 (1976). Petitioner's case was designated an "original jurisdiction" case referred to the National Commissioners for decision. 28 C.F.R. §§ 2.17 and 2.13(b) (1976). On July 7, 1976, the National Commissioners denied parole and continued petitioner until the expiration of his term for the stated reasons that:

> "Your offense behavior has been rated as very high severity because it involved extortion. You have a salient factor score of 11. You have been in custody for a total of 9 months. Guidelines established by the Commission for adult cases which consider the above cases indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, a decision outside the guidelines at this consideration is not found warranted."

Petitioner appealed to the National Appeals Board, 28 C.F.R. § 2.27 (1976), which, on October 19, 1976, affirmed the decision of the National Commissioners.

Jurisdiction

As noted above, Judge Waddy construed this action as a habeas corpus action.[3] Nevertheless, petitioner has persisted in asserting that there is a separate declaratory and injunctive aspect to the case, jurisdiction for which is alleged under 28 U.S.C. §§ 1331 and 1361.[4] The Court concurs in Judge Waddy's reading of the complaint and finds petitioner's contention to be completely without merit. The gist

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[3] "A fair reading of the Complaint confirms that this is an action sounding essentially in habeas corpus, the statutory remedy to relieve illegal restraints on custody." *Geraghty v. U.S. Parole Commission,* Civil No. 76-1729 (D.D.C., filed November 12, 1976) (Waddy, J.).

[4] *See* Document 2; Document 3 at 4; and Document 9 at 6 n.2 and at 9-10.

of petitioner's action is a challenge to the Parole Commission and Reorganization Act (PCRA),[5] the guidelines promulgated by the Commission,[6] and the Parole Commission's decision denying petitioner's release on parole. As such, the action presents a claim that petitioner is "in custody in violation of the Constitution or laws . . . of the United States . . ." 28 U.S.C. § 2241(c)(3). The "declaratory" and "injunctive" relief sought by petitioner against the Parole Commission is, in effect, a request for a ruling that petitioner is entitled to release on parole.[7] Thus, the action falls squarely within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez,* 411 U.S. 475 (1973); *see Gerstein v. Pugh,* 420 U.S. 103, 107 n.6 (1975); *Wolff v. McDonnell,* 418 U.S. 539, 554-555 (1974); *United States ex rel. Marrero v. Warden, Lewisburg Penitentiary,* 483 F.2d 656, 659-660 (3d Cir. 1973); *rev'd on other grounds,* 417 U.S. 653 (1974); *Battle v. Norton,* 365 F.Supp. 925 (D.Conn.1973); *cf. Ricketts v. Ciccone,* 371 F.Supp. 1249 (W.D.Mo.1974). Consequently, 28 U.S.C. § 2241 provides the sole jurisdictional basis for this action.

[5] Pub.L. 94-233, § 2 (Mar. 15, 1976), *codified at* 18 U.S.C. § 4201 et seq. (1976).

[6] 28 C.F.R. § 2.1 et seq. (1976).

[7] The "irreparable harm" alleged in support of the claim for injunctive relief is the denial of parole and the resulting continued confinement. *See* Complaint, paragraph 53.

MOTION TO CERTIFY CLASS

Petitioner purports to bring this habeas corpus action as a class action.[8] The complaint contains class allegations, and a motion to certify the class was filed with the complaint in the United States District Court for the District of Columbia. That motion was not acted upon by Judge Waddy and is presently before this Court. Petitioner has pressed for, and respondents have opposed, certification before both the United States District Court for the District of Columbia and this Court.

For the reasons stated in *United States ex rel. Sero v. Preiser,* 506 F.2d 1115, 1125 (2d Cir. 1974), *cert. denied,* 421 U.S. 921 (1975), the Court holds that Rule 23 of the Federal Rules of Civil Procedure is not applicable to a petition for a writ of habeas corpus. *Accord Bijeol v. Benson,* 513 F.2d. 965, 968 (7th Cir. 1975); but *see Williams v. Richardson,* 481 F.2d 358, 361 (8th Cir. 1973); *Mead v. Parker,* 464 F.2d 1108 (9th Cir. 1972); *Adderly v. Wainwright,* 58 F.R.D. 389 (M.D. Fla. 1972). Despite the technical nonapplicability of Rule 23, procedures analogous to a class action have been fashioned in habeas corpus actions where necessary and appropriate. *United States ex rel. Sero v. Preiser,* supra; *Bijeol v. Benson,* supra; *see*

[8] For the reasons stated in the preceding discussion on jurisdiction, the Court will not address petitioner's contention, Document 14 at 9-10, that the action is "an ordinary civil action to which the class act provisions of the Federal Rules of Civil Procedure 23 [apply]. . . ."

Williams v. Richardson, supra; *Mead v. Parker,* supra; *Adderly v. Wainwright,* supra.

In this case, class certification is neither necessary nor appropriate. Petitioner contends that class certification is necessary to ensure that the legal issues presented do not evade appellate review. This contention is based on petitioner's concern that his sentence will expire and thereby moot any appeal from this Court's decision. The motion for class certification represents petitioner's attempt to structure his suit to fit into the exception to the mootness doctrine enunciated in *Sosna v. Iowa,* 419 U.S. 393 (1975); *see e.g., Gerstein v. Pugh,* supra, 420 U.S. at 110 n.11. However, the possibility of mootness on appeal is not a proper consideration for determining whether or not the action should be maintained as a class action. *Cf.* Rule 23 of the Federal Rules of Civil Procedure, 28 U.S.C. (setting for the prerequisites to a class action). The issues petitioner raises may be litigated without the presence of a class.

Class certification is inappropriate for several reasons. Two of the issues raised—the Commission's characterization of petitioner's offense as extortion and access to certain Commission files—relate solely to petitioner's individual case and have no class-wide applicability.[9] *Cf. LoCicero v. Day,* 518 F.2d 783 (6th Cir. 1975). Another issue—the applicability of the

[9] The class sought to be certified is "all federal prisoners who have been or will become eligible for release on parole," Document 1 (Complaint, paragraph 5(a); and motion).

guidelines, 28 C.F.R. § 2.20 (1976) to prisoners sentenced under 18 U.S.C. § 4208(a)(2) (1958)—is similarly inapplicable to all the members of the proposed class. The remaining issues—the constitutionality of the PCRA and the guidelines—do present questions of law common to the class; however, not all members of the class have the same interest as petitioner. For example, prisoners who are, or will be, paroled under the PCRA and the guidelines clearly do not have the same interest as petitioner in seeking to have the statute declared unconstitutional. Thus, petitioner's claims are not typical of those of the proposed class. *Cf.* Rule 23(a)(3) of the Fed.R.Civ.P.; *see Sosna v. Iowa,* supra 419 U.S. at 403 and n.13. Furthermore, this Court does not have habeas corpus jurisdiction over all the members of the proposed class. *Fitzgerald v. Sigler,* 372 F.Supp. 889, 899 (D.D.C.1974); *see Braden v. 30th Judicial Circuit Court of Kentucky,* 410 U.S. 484, 495 (1973) (habeas corpus jurisdiction if custodian can be reached by service of process); *but see United States ex rel. Sero v. Preiser,* supra at 1127-1130.

Consequently, petitioner's motion for class certification will be denied.

Substantive Issues

Petitioner's pleadings present a broad attack on both the PCRA and the guidelines authorized by the statute. Petitioner claims that the PCRA is "facially" unconstitutional (Complaint, paragraph 5(b)(1)) be-

cause it vests the Parole Commission with the power to make deferred sentencing decisions, i. e. determinations of "just punishment," without proper due process safeguards and in violation of the constitutional ex post facto prohibition (Complaint, paragraphs 23 and 24). Petitioner apparently attacks the guidelines, 28 C.F.R. § 2.20 (1976) for the same reason (Document 14 at 35) and for the additional reason that the guidelines permit the Parole Commission to "superimpose upon federal criminal law a system of 'flat time sentencing' " (Document 14 at 16).

Petitioner's contentions equating parole and parole decision-making with sentencing reflect a misconception as to the nature of parole. There are "clear differences" between parole and sentencing. *United States ex. rel. Marrero v. Warden, Lewisburg, Penitentiary,* supra 483 F.2d at 661. Sentencing is the imposition of legislatively authorized punishment on one guilty of the commission of a crime. "The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Morrisey v. Brewer,* 408 U.S. 471, 477 (1972). Parole involves making a decision whether the eligible prisoner should serve his sentence in confinement or in society upon certain conditions. Thus, parole involves "implementing a prisoner's sentence," and "does not involve modification of the sentence." *United States ex rel. Marrero v. Warden, supra,* 483 F.2d at 661. Petitioner's contentions equating parole and sentencing

are, therefore, completely without merit. Parole is not a form of sentencing or a modification of sentence.[10]

Another broad attack on the guidelines is petitioner's contention that they are inconsistent with the PCRA. In particular, petitioner contends that the PCRA is "a major penal reform measure" which creates "vastly modified parole release criteria" (Document 14 at 20 and 25), that the Commission's guidelines under the prior act[11] have been repromulgated as the current guidelines (Document 14 at 28), and therefore, that the current guidelines reflect the parole release criteria under the prior act rather than those set forth in the PCRA.

It is hard to read the prior Act and the PCRA and its legislative history without coming to a conclusion completely contrary to petitioner's. The parole release criteria under the prior act were: (1) a reasonable probability that the prisoner would remain at liberty without violating the law; and (2) the compatibility of the prisoner's release with the welfare of society. 18 U.S.C. § 4203(a)(1970); *see Wiley v. United States Board of Parole,* 380 F.Supp. 1194

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[10] *See Roach v. Board of Pardons and Paroles, State of Arkansas,* 503 F.2d 1367, 1368 (8th Cir. 1974) (". . . [P]arole is a supervised release from incarceration *prior* to the termination of sentence. . . . Therefore, [parole denial does not increase the sentence]. . ."); *Garcia v. U.S. Board of Parole,* 409 F.Supp. 1230, 1239 (N.D.Ill.1976) (use of guidelines is not a *per se* usurpation of sentencing).

[11] Act of June 25, 1948, ch. 645, 62 Stat. 854.

(M.D.Pa.1974). The prisoner's observance of the rules of the institution in which he was confined was set forth as a condition of eligibility for parole. 18 U.S.C. § 4202 (1951). Under the PCRA, the parole release criteria are:

> "§ 4206. *Parole determination criteria*
>
> (a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:
>
> (1) that release would not depreciate the seriousness of the offense or promote disrespect for the law; and
>
> (2) that release would not jeopardize the public welfare; . . . ."

As is readily apparent from a comparison of the two acts, the parole release criteria are substantially the same. Although institutional performance is now a parole release criterion rather than a condition of eligibility, the difference in characterization is not substantive. The "depreciate the seriousness of the offense" language in the PCRA is language specifically upheld in this district as complying with the statutory criteria of the prior act. *Wiley v. United States Board of Parole,* supra; *deVyver v. Warden, U. S. Penitentiary,* supra, 388 F.Supp. at 1224; *see*

Garcia v. U. S. Board of Parole, 409 F.Supp. 1230, 1234 (N.D.Ill.1976).

Therefore, although the PCRA restates the criteria under the prior act, it does not significantly change them.[12]

Nevertheless, petitioner contends that the PCRA places a greater emphasis on "the nature and circumstances of the offense" than did the prior act (Document 14 at 28). There is absolutely no basis for petioner's contention. The statute itself, 18 U.S.C. § 4206 (a) (1976) places no undue emphasis on the nature and circumstances of the offense. Indeed, it directs the Parole Commission to make its determination "upon consideration of the nature and circumstances of the offense *and* the history and characteristics of the prisoner." (Emphasis added). The Joint Explanatory Statement of the Committee of Conference confirms that the nature and circumstances of the offense is to be considered *together with,* rather than given emphasis over, the history and characteristics of the prisoner:

> ". . . [I]t is the intent of the Conferees that the Parole Commission review and consider *both* the nature and circumstances of the offense and the history and characteristics of the prisoner. It is

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[12] *See* Joint Explanatory Statement of the Committee of Conference, 94th Cong., 2d Sess. (1976), 3 U.S.Code Cong. & Admin.News, p. 353 ("The legislation provides a *new statement* of criteria . . ." (Emphasis added).

> the view of the Conferees that *these two items* are most significant in making equitable release determinations and are a viable basis, *when considered together,* for making other judgments required by this section." (Emphasis added).

Joint Explanatory Statement of the Committee of Conference, 94th Cong., 2d Sess. (1976), 3 U.S.Code Cong. & Admin. News, p. 358 (1976). In explaining a related section of the PCRA, the information to be considered by the Parole Commission 18 U.S.C. § 4207 (1976), the Committee of Conference specifically stated that the weight to be given any particular factor is "solely within the province of the (commission's) broad discretion." 3 U.S.Code Cong. & Admin.News, p. 360 (1976).

Petitioner's entire argument that the guidelines are inconsistent with the PCRA because they are merely a repromulgation of the old guidelines whereas Congress intended to vastly modify the parole release criteria is emphatically rejected by a reading of the Joint Explanatory Statement of the Committee of Conference. The Statement makes it quite clear that Congress not only intended to incorporate the guidelines, as developed under the prior act, into the PCRA, but also attempted thereby to remove doubt as to their legality:

> ". . . [T]he Parole Board began reorganization in 1973 *along the lines of the legislation presented here.*

> "The organization of parole decision-making along regional lines, the use of hearing examiners to prepare recommendations for action, *and, most importantly, the promulgation of guidelines* to make parole less disparate and more understandable *has met with such success that this legislalation incorporates the system into the statute,* removes doubt as to the legality of changes implemented by administrative reorganization, and makes the improvements permanent." (Emphasis added). 3 U.S.Code Cong. & Admin.News, pp. 352-353 (1976).

A third contention of petitioner's is that the guidelines are unlawful because they repeal by administrative fiat the provisions of 18 U.S.C. § 4208(a)(2) (1958)[13] (Document 14 at 40 and 43). What petitioner is really claiming is that the Commission's guidelines should not be applied to a prisoner, such as himself, who was sentenced under 18 U.S.C. § 4208(a)(2) (1958). Petitioner's contention has been previously rejected in this district for reasons which are equally applicable under the PCRA:

> "It should be noted that 18 U.S.C.A. § 4208(a)(2) is used by the sentencing court to determine when a prisoner can be considered for release on

[13] 18 U.S.C. § 4208(a)(2) provides in relevant part: "(a) Upon entering a judgment of conviction, . . . for a term exceeding one year, . . . (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board of parole may determine."

parole, and does not affect the Board's discretion in determining whether parole should be granted. . . . Section 4208(a)(2) merely eliminates the requirement of 18 U.S.C.A. § 4202 that a prisoner serve one-third of his sentence before becoming eligible for parole consideration. Section 4208(a)(2) does not annul or modify the statutory requirements with respect to suitability for parole release embodied in 18 U.S.C.A. § 4203 and the Board's paroling guidelines promulgated thereunder, 39 Fed.Reg. § 2.20 (1974). Thus, a prisoner sentenced under Section 4208(a)(2) is subject to the same substantive parole release standards as all other inmates."

Stroud v. Weger, 380 F.Supp. 897, 899 (M.D.Pa. 1974).

United States v. Hawthorne, 532 F.2d 318 (3d Cir. 1976) and *United States v. Salerno,* 538 F.2d 1005 (3d Cir. 1976), cited to the Court by petitioner, do not overrule *Stroud. Hawthorne* held that a sentence imposed under 18 U.S.C. § 4202 (1951) is "harsher" than an identical sentence imposed under 18 U.S.C. § 4208(a)(2) (1958) for the reason that § 4208(a)(2) (1958) "creates the possibility of release from incarceration prior to the . . . one-third point in the [§ 4202] sentence . . ." 532 F.2d at 324. The case in no way involved the applicability of the guidelines to a prisoner sentenced under § 4208(a)(2) (1958). *Salerno,* also, is inapposite. *Salerno* involved a question

of whether the sentencing judge's expectations were frustrated by the Parole Board's subsequent promulgation of its guidelines. The Third Circuit found that the sentencing judge's expectations had been frustrated, and remanded to the district court for a correction of sentence. The applicability of the guidelines to a prisoner, such as petitioner, who was sentenced under § 4208(a)(2) by a court *fully aware of the guidelines,*[14] was not at issue in *Salerno.*

Petitioner complains that the Commission characterized his offense as "extortion," an offense listed in the "very high" severity of the Commission's Adult guidelines. 28 C.F.R. § 2.20 (1976). Petitioner maintains that although he was convicted of a violation of 18 U.S.C. § 1951, his offense is something "other than extortion because it did not involve force, threats or violence. The Court is surprised by petitioner's argument. As respondents correctly note, petitioner's offense involved obtaining money under color of official right. *See United States v. Braasch,* supra, 505 F.2d 139. The statute under which petitioner was convicted specifically defines such an offense as extortion. 18 U.S.C. § 1951(b)(2).

Petitioner contends that until he filed this suit, the Parole Commission denied him access to a "hearing summary" of a parole hearing *prior* to the one at

[14] Petitioner's sentence was corrected by a court which was fully aware of the Parole Board's guidelines. *See Geraghty v. United States,* No. 76 C 4215 (N.D.Ill., Dec. 21, 1976), cited in note 2 infra.

issue here.[15] Petitioner maintains that the Commission's denial of access prevented him from "any opportunity to learn the facts relied upon by the hearing examiner panel . . . [in classifying his offense as] 'very high severity,'" *see* Document 12, and thereby prevented him from fully challenging the facts on which the Commission relied (*see* Document 14 at 43-44). Petitioner's contention provides no basis for relief from the Commission's decision denying parole. The Notice of Action, dated July 7, 1976, informed petitioner that his offense was classified "very high" severity because it involved extortion. That statement was sufficient to put petitioner on notice as to the reason for the Commission's action. Moreover, in light of petitioner's conviction under 18 U.S.C. § 1951, and the Seventh Circuit's affirmance of his conviction, it is hard to imagine how petitioner could effectively challenge the facts on which the Commission relied. Thus, the error, if any, in denying petitioner's access to his December 1975 hearing summary was harmless.

Based on the record and the foregoing discussion, the Court finds that the Commission "followed criteria appropriate, rational and consistent with the statute [the PCRA] and that its decision is not arbitrary or capricious, nor based on impermissible considerations." *Zannino v. Arnold,* 531 F.2d 687, 690

[15] Petitioner does not allege that the Commission denied him access to its records of the June 1976 parole hearing, records which he would be entitled to under the PCRA. 18 U.S.C. § 4208(f). The hearing summary sought by petitioner relates to a December, 1975 parole hearing not at issue here.

(3d Cir. 1976). Accordingly, the Court will deny the petition for a writ of habeas corpus and will dismiss the action.

The foregoing shall constitute the Court's findings of fact and conclusions of law.

/s/ R. DIXON HERMAN
R. Dixon Herman
United States District Judge

Dated: February 24, 1977.

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-572

UNITED STATES PAROLE COMMISSION, ET AL.,
Petitioners

—*v.*—

JOHN M. GERAGHTY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 5, 1978
CERTIORARI GRANTED MARCH 5, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-572

UNITED STATES PAROLE COMMISSION, ET AL.,
Petitioners

—*v.*—

JOHN M. GERAGHTY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

SUMMARY OF RELEVANT DOCKET ENTRIES

DATE	ITEM
	United States District Court for the District of Columbia, Civil Action No. 76-1729
9/15/76	File: Complaint for declaratory and injunctive relief; plaintiff's motion for interlocutory relief; plaintiff's motion to set expedited hearing; plaintiff's motion to certify class
10/4/76	File defendants' opposition 1) to motion for interlocutory relief; 2) to motion to certify class
10/6/76	File defendants' motion to transfer and for enlargement of time
10/15/76	File plaintiff's memorandum in reply to opposition to motion to certify; file plaintiff's reply to opposition to motion for interlocutory relief with exhibits
10/20/76	File plaintiff's response in opposition to motion to transfer
11/1/76	File defendants' reply to plaintiff's response in opposition to transfer
11/12/76	Enter order: Case transferred to United States District Court for the Middle District of Pennsylvania. Memorandum opinion filed.
	United States District Court for the Middle District of Pennsylvania, Civil No. 76-1467
12/3/76	File plaintiff's amendment to complaint
12/7/76	Enter order directing respondents to show cause why relief requested should not be granted
12/13/76	File return and answer of respondents to the amended petition for writ of habeas corpus; file brief of respondents in opposition to petition for writ of habeas corpus

12/27/76 File plaintiff's allegations of additional material facts

12/29/76 File plaintiff's motion for summary judgment File brief of John M. Geraghty in support of (a) Motion to Certify Class, (b) Motion for Summary Judgment, and in Reply to Brief in Opposition to Petition for Writ of Habeas Corpus

1/10/77 File opposition of respondents to petitioner's motion for summary judgment

1/17/77 File reply memorandum of petitioner in support of motion for summary judgment

2/24/77 Enter order: Motion for class certification is denied. It is further ordered that the petition for writ of habeas corpus is denied, and the action is dismissed. Memorandum opinion filed

4/15/77 File notice of appeal of John M. Geraghty

4/28/77 File petition of Eliezer Becher to intervene as a party plaintiff after judgment; memorandum in support thereof, and proposed amendment to complaint to include Becher as a party plaintiff and add new allegations

5/5/77 File respondents' opposition to petition to intervene after judgment

5/11/77 Enter order: Petition to intervene is dismissed for lack of jurisdiction. Memorandum opinion filed

6/9/77 File notice of appeal of Eliezer Becher; motion for leave to appeal in forma pauperis.

6/16/77 Enter order granting motion of Eliezer Becher for leave to appeal in forma pauperis

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action 76-1729

JOHN M. GERAGHTY, P.O. Box 1000,
Montgomery, Pennsylvania, individually
and on behalf of a class, PLAINTIFFS

—*vs.*—

UNITED STATES PAROLE COMMISSION and
ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff JOHN M. GERAGHTY, individually and on behalf of a class, by counsel, alleges the following:

1. This is a civil action arising under the Fifth Amendment of the Constitution of the United States, the Administrative Procedure Act (5 U.S.C. §§ 7-0-706), and the federal common law; the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 2241, and Section 10 of the Administrative Procedure Act. As set out below with greater specificity, the rights involved for each member of the plaintiff class exceed ten thousand dollars, exclusive of interest and costs, in worth.

2. Defendant United States Parole Commission is the federal agency to which the duty to promulgate regulations governing parole release decisions has been delegated. (18 U.S.C. § 4203(a)1 (1976))

3. Defendant Attorney General of the United States is the federal official having custody over all federal prisoners. (18 U.S.C. § 4082)

4. Plaintiff John M. Geraghty is a federal prisoner, presently confined at the Federal Prison Camp at Allenwood, Pennsylvania, by virtue of a sentence imposed in the United States District Court for the Northern District of Illinois, *sub nom. United States* v. *Braasch, et al.*, No. 72 Cr. 979, (N.D. Ill. 1973), affirmed 505

F.2d 139 (7th Cir. 1974), cert. denied 421 U.S. 910 (1975). Geraghty had initially been sentenced to a 48 month term of imprisonment under the terms of 18 U.S.C. § 4208(a)2 (1970), upon his conviction of conspiracy to commit extortion, 18 U.S.C. § 1951, and false declarations to a grand jury, 18 U.S.C. § 1923. On October 9, 1975, the district court reduced this sentence to a term of 30 months, also under the terms of 18 U.S.C. § 4208(a)2 (1970). The government is presently seeking to vacate this sentence reduction in a case awaiting decision in the United States Court of Appeals for the Seventh Circuit, *United States* v. *Braasch*, No. 76-1148, appeal argued June 11, 1976. Under his modified sentence, absent parole, Geraghty will be discharged on June 30, 1977; if the sentence reduction is undone, absent parole, Geraghty expects to be discharged on May 29, 1978.

5. Plaintiff brings this as a class action, under the provisions of Federal Rule of Civil Procedure 23(b)2:

a. The class consists of all federal prisoners who have been or will become eligible for release on parole. There are approximately 25,000 federal prisoners, and the class is so numerous that joinder of all members is impracticable.

b. Among the questions common to the class are:

1. Whether Public Law 94-233 is facially unconstitutional?

2. Assuming that the statute is constitutional, may the powers vested in the United States Parole Commission to make deferred sentencing decisions be retroactively applied to persons, like plaintiff, sentenced prior to the effective date of the new act?

3. Whether the "guidelines for decision-making," 28 C.F.R. § 2.20, are arbitrary, unlawful, and create classifications contrary to the due process clause of the Fifth Amendment?

4. Whether the present policies of the United States Parole Commission effect the repeal of the ameliorative provisions intended in 18 U.S.C. § 4208(a)2 (1970)?

c. The claims of plaintiff Geraghty are typical of the claims of the class, as set out below with greater specificity.

d. Plaintiff Geraghty will fairly and adequately represent the interests of the class: Geraghty's interests are identical to the interests of the class, and he is represented by counsel skilled and experienced in this type of litigation.

e. Defendant United States Parole Commission has acted on grounds generally applicable to the class, and declaratory and injunctive relief is appropriate to the class as a whole.

f. A class action is superior to any other type of action: The issues raised in this action are capable of repetition among members of the class, but if an individual action is brought, the issue will likely evade review, if the individual plaintiff is released prior to a final disposition of the lawsuit.

Denial of Parole

6. Geraghty was considered for parole in December of 1975; on December 12, 1975, his case was designated as "original jurisdiction," per 28 C.F.R. § 2.17(3), and referred to the National Directors of the United States Board of Parole for disposition.

7. On January 13, 1976, Geraghty was notified that he had been denied parole for the following reasons

> Your offense behavior has been rated as very high severity. You have a salient factor score of 11. You have been in custody for a total of 4 months. Guidelines established by the Board for adult cases which consider the above factors indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found that a decision at this consideration outside the guidelines does not appear warranted. Board policy prohibits a continuance past one-third of your sentence at initial hearing. Therefore, your case had been

scheduled for further consideration at one-third of your sentence.

8. Information relevant to Geraghty's "good institutional program performance and adjustment" had been presented to the National Directors in a "progress report," prepared by Geraghty's caseworker, which attested to his good performance and adjustment.

9. Within 30 days of receiving notice of the denial of parole by the National Directors, Geraghty appealed to the entire Board of Parole, in accordance with 28 C.F.R. § 2.27. The Board voted to affirm the initial decision in April of 1976.

10. In June of 1976, Geraghty was reconsidered for parole; prior to this hearing, a "progress report" was prepared by his social worker, and made available for the parole release decision; this report attested to Geraghty's good institutional adjustment and program performance.

11. On June 17, 1976, Geraghty's case was designated as "original jurisdiction," and referred to the National Commissioners of the United States Parole Commission for disposition.

12. On July 7, 1976, the National Commissioners denied parole to Geraghty, supplying the following rationale

> Your offense behavior has been rated as very high severity because it involved extortion. You have a salient factor score of 11. You have been in custody for a total of 9 months. Guidelines established by the Commission for adult cases which consider the above cases indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, a decision outside the guidelines at this consideration is not found warranted.

13. The order accompanying the denial of parole directed that Geraghty continue in confinement until the expiration of his sentence.

14. On August 6, 1976, Geraghty filed an appeal to the United States Parole Commission from the order

denying him parole. Pursuant to 28 C.F.R. § 2.27(a), this appeal will be heard at the next quarterly meeting of the Parole Commission, which is in October of 1976.

15. It is likely that this appeal will be futile: On July 31, 1976, Geraghty requested immediate reconsideration of the order denying him parole; this request was denied, on the grounds that the Parole Commission "has determined that no favorable action can be taken at this time."

16. Absent parole, Geraghty expects to be released on June 30, 1977, or nine months after the commencement of this action.

The Statute

17. Parole was first applied to the federal correctional system in 1910 by the Act of June 25, 1910, ch. 387, § 1, 36 Stat. 819, which provided, in pertinent part, as follows:

> That if it shall appear to said board of parole from a report by the proper officers of such prison or upon application by a prisoner for release on parole, that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society, then said board of parole may in its discretion authorize the release of such applicant on parole, and he shall be allowed to go on parole outside of said prison . . .

18. Prior t. March 15, 1976, the statute governing the discretion of the Board of Parole, which was in effect at the time Geraghty was sentenced, was compiled in 18 U.S.C. § 4203(a), and provided, in pertinent part, as follows:

> If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such re-

lease is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.

19. On March 15, 1976, Public Law 94-233, the "Parole Commission and Reorganization Act," was enacted into law. This was the first significant change in parole procedures and release criteria since the creation of parole for federal prisoners in 1910, in the Act of June 25, 1910, ch. 387, § 1, 36 Stat. 819.

20. Public Law 94-233 effects major changes in parole eligibility: First, parole under the new act is only available when a sentence of greater than one year is imposed. Compare 18 U.S.C. § 4205(a) (1976) with prior law, 18 U.S.C. § 4203 (1970). Second, a prisoner, regardless of sentence, must be considered for parole after 10 years (§ 4205(a) (1976)), rather than the 15 years of 18 U.S.C. § 4203 (1970). Third, institutional behavior, a condition of parole eligibility under prior law (18 U.S.C. § 4203(a) (1970)) is no longer a condition of eligibility, but is now a condition for parole release (§ 4206(a) (1976)).

21. Public Law 94-233 expands the scope of the factual inquiry at the parole hearing; under prior law (18 U.S.C. § 4203 (1970)), the Board of Parole considered facts presented "from a report by the proper institutional officers." § 4206(a) (1976) directs the Parole Commission to consider "the nature and circumstances of the offense and the history and characteristics of the prisoner..."

22. Public Law 94-233 changes the parole release criteria, by including institutional behavior as a factor in the parole release decision, and by broadening the scope of the factual inquiry of the parole release hearing. In addition, the new statute requires the Commission to act "pursuant to guidelines." In pertinent part, § 4206(a) (1976) provides:

> (a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:
>
> (1) that release would not depreciate the seriousness of his offense or promote disrespect for law, and
>
> (2) that release would not jeopardize the public welfare;
>
> subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines promulgated by the Commission pursuant to § 4203(a)(1), such prisoner shall be released.

23. Insofar as Public Law 94-233 vests the United States Parole Commission with the power to make deferred sentencing decisions, the act is unconstitutional, as the procedural safeguards required at a deferred sentencing hearing to satisfy the requirements of due process of law are expressly excluded in the new act.

24. Insofar as the Act constitutionally vests the United States Parole Commission with the power to make deferred sentencing decisions, application of this power to a prisoner, like plaintiff Geraghty, sentenced prior to the effective date of the new act would be of ex post facto effect, and thereby unconstitutional.

The Regulations

25. In 1973, the United States Board of Parole adopted "guidelines for decisionmaking," 38 Fed. Reg. 31942 (November 19, 1973). These regulations define a fairly tight framework to circumscribe the Board's statutorily broad power, and to grant parole. The current "guidelines" were published at 41 Fed. Reg. 37316, 37222 (September 3, 1976).

26. The "guidelines" consist of two scales which determine the range of "customary total time before release" to be served before parole will be granted:

a. The first scale, known as the "offense severity scale," contains six classifications of offense severity, ranging from "low" through "moderate" to "greatest." For each classification of offense severity, the "offense

severity scale" lists four ranges of the "customary total time served before release."

b. The second scale, known as the "salient factor scale," determines which of the four ranges of "customary total time" will be applied to a given prisoner. Plaintiff Geraghty has a "salient factor score" of 11—the highest possible score—and was classified under the lowest range of "customary total time served before release."

27. Separate tables of "customary total time to be served before release" have been prepared for "adult" cases, "youth" correction act cases, and "NARA" (Narcotics Addict Rehabilitation Act) cases. Under the guidelines, an "adult" sentenced under 18 U.S.C. § 4208 (a) (1970), as plaintiff Geraghty, will be considered as having the same "customary total time before release" as a person receiving a regular adult sentence, under 18 U.S.C. § 4202 (1970).

28. The "offense severity scale" applied to plaintiff Geraghty at his second parole hearing was published at 41 Fed. Reg. 19330 (May 12, 1976) and had been repromulgated without significant changes at 41 Fed. Reg. 37222 (Sept. 3, 1976).

29. Offense severity for the "guidelines" is predetermined from the name of the offense, and is independent of the actual sentence which may have been imposed, and of the nature and circumstances of the offense and the history and circumstances of the prisoner. Plaintiff Geraghty was classified as a person who had committed an offense of "very high severity because it involved extortion."

Thus, extortion would be a "very high severity" offense regardless of whether the maximum permissible sentence was three years, as in 18 U.S.C. § 872, or twenty years, as in 18 U.S.C. § 1951. And the "minimum customary total time served" would be the same 26-36 months, regardless of whether it exceeded the actual sentence imposed, or was shorter than the parole eligibility date.

Creation of the Guidelines

30. The creation of the "guidelines for decision making" is described in three reports sponsored by the United States Board of Parole: Hoffman, *Paroling Policy Feedback*, June, 1973 (NCCD Parole Decision Making Project Supp. Rep. No. 8); Hoffman & Gottfredson, *Paroling Policy Guidelines: A Matter of Equity*, June 1973 (NCCD Parole Decision Making Project Supp. Rep. No. 9); Hoffman & Beck, *Application of a Severity Scale*, June 1973 (NCCD Parole Decision Making Project Supp. Rep. No. 13).

31. The "guidelines" are loosely based upon the policies applied at one time in release decisions in Youth Corrections Act cases, 18 U.S.C. §§ 5005-5026: From November 1, 1971 to March 30, 1972 (Hoffman at 7), a study was conducted for the Board of Parole to determine what criteria it was using in release decisions in YCA cases. (Hoffman at 2)

32. The purpose of this study was to make explicit the considerations and relative weightings used in YCA release decisions, to enable the "parole board members to examine the congruence of actual with desired policy on a macroscopic level." (Hoffman at 26)

33. The study indicated that only two factors were controlling release decisions in YCA cases—a judgment of the severity of the prisoner's offense behavior, and a subjective estimation of the likelihood of a favorable parole outcome. (Hoffman at 12)

34. After the Board of Parole was informed that it was considering only two factors in YCA release decisions, it decided that future release decisions for all prisoners eligible for parole should be controlled by these two factors. (Hoffman & Gottfredson at 9)

35. This decision was predicated on the view that parole is a "deferred sentencing decision" (Hoffman & Gottfredson at 3), regardless of whether parole eligibility was mandated by statute, as in a regular adult sentence (18 U.S.C. § 4202), or whether parole eligibility was within the discretion of the Board, as in YCA cases, or in sentences imposed under 18 U.S.C. § 4208(a)2.

36. The two factors that the Board chose to determine prospective parole release policies had been subjectively rated in the YCA study: "A disadvantage of subjective measures is that they may reflect rationalizations for decisions rather than determinants of them. For example, if a parole board member is examining a case and develops a subjective desire to parole, he may tend to credit the subject with better institutional progress or a higher chance of success than is, in fact, indicated." Hoffman at 11. Similarly, if there is a "subjective desire to parole," offense severity may be rated lower "than is, in fact, indicated."

37. To eliminate this subjectivity, the *ad hoc* estimation of the likelihood of a favorable parole outcome was replaced by an 11 point "salient factor scale." (Hoffman & Gottfredson at 9) In addition, the *ad hoc* judgment of the severity of an individual's behavior was replaced by rating the severity of the type of offense for which the sentence had been imposed.

38. To obtain this rating of offense severity, members of the Board of Parole sorted 51 index cards "into six piles labeled 'low severity,' low/moderate severity,' 'moderate severity,' 'high severity,' 'very high severity,' and 'greatest severity' offenses, producing a six point severity scale." (Hoffman & Beck at 26-27)

39. Each index card contained one label of offense behavior, e.g., "armed robbery," "embezzlement less than $20,000," "possession of 'heavy narcotics' by addict less than $500," "statutory sex offenses." (Hoffman & Beck at 3, 7-14)

40. The guideline severity ratings were created after each member of the Board of Parole had been given a rating sheet of offense severity as well as the pooled ratings of the group: "The members then discussed and voted as to the appropriate severity level for each of the offense descriptions to be used (for the next six month period) in the decision guidelines." (Hoffman & Beck at 28) The result of this vote is essentially the severity scale of the present guidelines. (Hoffman & Beck at 28)

41. The "guidelines for decision making" represented a new "prospective policy" (Hoffman & Beck at 27) for

parole release decisions, bearing no rational relation to the subjective parole release decisions formerly extant in YCA cases or in regular adult cases.

42. The "customary length of imprisonment" for the guidelines was obtained by computing the median length of time served in prior years for each "severity/prognosis" level, and by then adding an arbitrary "discretion range" to obtain the spread of the present guidelines. (Hoffman & Gottfredson at 10)

43. The median is different from the mean: The mean is the arithmetic average, while the "median may be defined as that score value which partitions the set into two subjects, with an equal number of scores in each, so that the number of scores above the median value is equal to the number of scores below the median. (Lordahl, *Modern Statistics for Behavioral Sciences* (1967) at 37)

44. The difference between the mean and the median is illustrated by an example: The median length of imprisonment for a "high severity offense" and an "excellent" prognosis level was computed as 31 months. Assuming that the sample size for this severity/prognosis level was nine samples, the same median of 31 months would be computed if the actual lengths of imprisonment had been (in months)

6, 7, 8, 9,	31,	32, 33, 34, 35
	or	
27, 28, 29, 30,	31,	32, 33, 34, 35.

The median of 31 months "partitions the set into two subsets," with four scores in each.

45. Although the median is the same for both arrays of the example, the mean is about 22 months for the first group, and 31 months for the second group.

46. In computing the "customary length of imprisonment" of the "guidelines," no attempt was made to determine if the type of distribution of the first array ("bimodal") was present in the pre-guidelines "customary length of imprisonment."

47. The "guidelines" created new parole release policies (Hoffman & Beck, supra at 27), not rationally related to the parole release policies extant prior to adoption of the guidelines.

Application of the Guidelines

48. The overwhelming number of parole release decisions for persons receiving regular adult sentences and persons sentenced under the provisions of 18 U.S.C. § 4208(a)2 (1970) falls within the "discretion range" of the "guidelines." During the first half of 1975, 83.8% of Parole Board discretionary decisions fell within the guidelines, with only 8.7% having been more lenient.

CLAIMED DEFECTS IN THE "GUIDELINES"

49. The classification of offense severity set out in the guidelines is unlawful, in that it fails to conform to the mandate of 18 U.S.C. § 4206(a), that parole release decisions be based "upon consideration of the nature and circumstances of the offense."

50. The "customary length of imprisonment" defined by the guidelines is arbitrary, in that it disregards the actual sentence imposed, and is not rationally related to the "customary length of imprisonment" extant prior to adoption of the guidelines.

51. The Parole Commission has failed to promulgate guidelines which distinguish parole release decisions for persons, like plaintiff Geraghty, sentenced under the provisions of 18 U.S.C. § 4208(a)2, (1970), where parole release is determined by rehabilitation. The effect of this omission is that persons sentenced under this statute are considered under the same parole release criteria as persons who received regular adult sentences, i.e., that the provisions of 18 U.S.C. § 4208(a)2 (1970) have been repealed by administrative action.

52. The guidelines classify all prisoners eligible for parole into two groups—one which will receive serious consideration for release on parole, and another which will not receive such consideration; this classification is based solely on the length of sentence imposed by the

district court judge, is independent of the nature and circumstances of the offense, and therefore deprives a prisoner, like Geraghty, who received "too short" a sentence of his right to serious consideration for release on parole.

IRREPARABLE HARM

53. Plaintiff Geraghty has been denied parole solely through application of the "guidelines." While he is confined in prison, his family of wife and eight children, seven of whom live at home, are on welfare; Geraghty's spouse is becoming mentally and physically incapable of contending with all of the pressure, the financial burdens, and the problems of managing a large household singlehandedly that result from his continued incarceration. The injury resulting from the denial of parole has a monetary value in excess of ten thousand dollars.

54. From the time of Geraghty's indictment in December of 1972 until September of 1975, he was enlarged on nominal bail, appeared in court whenever required to do so, and there has never been any suggestion that continued enlargement posed a danger of any kind to society. Geraghty's progress report, prepared on May 26, 1976, indicates that he has maintained a "clear conduct record," and that his "detail supervisor is very pleased with his performance and abilities and wishes that he had several more workers of his caliber under his supervision." In addition, this report states that Geraghty is believed to be "not generally regarded to be criminally oriented and appears more to be a situational type of offender. He has resources available to him in the community, both family and promise of employment."

WHEREFORE plaintiffs requests that the Court

1. Certify that this action may be maintained as a class action on behalf of all federal prisoners who are, or will be, eligible for release on parole;

2. Fashion such interlocutory relief as may be appropriate to enlarge Geraghty from custody pending final disposition of this case,

3. Declare that Public Law 94-233 is unconstitutional, insofar as it vests the United States Parole Commission with the power to make deferred sentencing judgements for any prisoner, or, alternatively, for persons sentenced prior to the effective date of the new act,

4. Declare that the "guidelines for decisionmaking," 28 C.F.R. § 2.20, are unlawful, arbitrary, and unconstitutional, and enter such injunctive relief as may be required to prohibit the United States Parole Commission from denying, or continuing to deny, parole to any prisoner eligible for parole, by application of those regulations,

5. Whatsoever other relief as may be required.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. 76-1729

JOHN M. GERAGHTY, individually and
on behalf of a class, PLAINTIFFS

—*vs.*—

UNITED STATES PAROLE COMMISSION, ET AL., DEFENDANTS

MOTION TO CERTIFY CLASS

Pursuant to Federal Rule of Civil Procedure 23(c)(1), plaintiffs move the Court to certify that this action may be maintained as a class action. As alleged in the complaint (¶ 5), all of the pre-requisites for a class action under Rule 23(b)2 are met in this case, and certification as a class action is necessary to insure that the issues in this case, which are capable of repetition, will not evade review, as in *Preiser* v. *Newkirk*, 422 U.S. 395 (1975), and *Bradford* v. *Weinstein*, 423 U.S. 127 (1975). *See*, e.g., Gerstein v. Pugh, 420 U.S. 103, 110 n. 11 (1975).

For these reasons, the Court should certify that this case may be maintained as a class action on behalf of all federal prisoners who are or who will become eligible for release on parole.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. 76-1729

JOHN M. GERAGHTY, individually and
on behalf of a class, PLAINTIFFS

—*vs.*—

UNITED STATES PAROLE COMMISSION, ET AL., DEFENDANTS

PLAINTIFFS' MOTION TO SET EXPEDITED HEARING

Plaintiffs move the Court to set the pending motion of plaintiff Geraghty for interlocutory relief for a prompt hearing. As grounds for this motion, plaintiffs, by counsel, state as follows:

1. If Geraghty prevails in this case, he will be entitled at the very least to a re-hearing of the decision of the United States Parole Commission denying him parole.
2. Geraghty is due to be discharged absent parole in June of 1977, and if this case is to have any meaning for Geraghty, relief must be fashioned swiftly.
3. Defendants will not be prejudiced by an expedited disposition of this case, as the issues in this case are identical to those raised in *Cale* v. *Attorney General*, both in this Court, Civil Action No. 75-1822, and in the Court of Appeals, No. 76-1171.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. 76-1729

JOHN M. GERAGHTY, individually and
on behalf of a class, PLAINTIFFS

—*vs.*—

UNITED STATES PAROLE COMMISSION, ET AL., DEFENDANTS

MOTION OF PLAINTIFF GERAGHTY FOR INTERLOCUTORY RELIEF

Pursuant to Federal Rule of Civil Procedure 65 and 28 U.S.C. § 1651, plaintiff John M. Geraghty requests that the Court fashion interlocutory relief in the form of an order directing the issuance of a writ of habeas corpus, enlarging Geraghty from confinement upon such conditions as may be appropriate pending final disposition of this case. This motion is based on evidentiary material and memoranda filed in the related case of *Cale* v. *Attorney General*, Civil Action 75-1822.

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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 76-1467

JOHN M. GERAGHTY, individually and
on behalf of a class, PLAINTIFFS

—*vs.*—

UNITED STATES PAROLE COMMISSION, and
ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANTS

AMENDMENT TO COMPLAINT

Pursuant to Federal Rule of Civil Procedure 15(d), the complaint is hereby amended by the addition of the Superintendent, Federal Prison Camp, Allenwood, Pennsylvania, as a defendant in this cause, and by the addition of the following allegations:

I. Paragraph 4 of the complaint heretofore filed is replaced by the following:

> 4. Plaintiff JOHN M. GERAGHTY is a federal prisoner confined at the Federal Prison Camp, at Allenwood, Pennsylvania. Geraghty's custody is the result of a sentence imposed by the United States District Court for the Northern District of Illinois, *sub. nom. United States* v. *Braasch*, No. 72 Cr 979, aff'd 505 F.2d 139 (7th Cir. 1974), cert. denied 421 U.S. 910 (1975). Geraghty was initially sentenced to a 48 month term of imprisonment under the terms of 18 U.S.C. § 4208(a)(2) (1970); on October 9, 1975, the district court in the Northern District of Illinois reduced Geraghty's sentence to a term of 30 months, also under the provisions of 18 U.S.C. § 4208(a)(2) (1970). The government's attempt to upset this sentence reduction was rejected by the Court of Appeals on October 4, 1976, sub. nom. *United States* v. *Braasch*, —— F.2d —— (No. 76-1148, 76-1309, 7th Cir., October 4, 1976) (appeal dismissed; mandamus denied) On November 15, 1976, Geraghty filed a motion to correct sentence, pursuant to 28 U.S.C. § 2255, in the Northern District of Illinois, *Geraghty* v. *United States*, No. 76 C 4215. Under the terms of his present sentence, Geraghty will be discharged from custody on June 30, 1977. In addition, absent relief in this action or in the action pending in the Northern District of Illinois, Geraghty expects to be transferred to a half-way house on Chicago, Illinois on or about December 15, 1976.

II. The following is added to the complaint:

COUNT II

55. Plaintiff realleges the allegations of paragraphs 6-14 of the complaint.

56. On October 19, 1976 the National Appeals Board of the United States Parole Commission affirmed the previous decision denying parole to plaintiff, and continuing him to expiration; the following rationale was supplied by the National Appeals Board:

> a) No other information submitted for requested review was deemed significant enough to affect the decision.
>
> b) Reasons given support the decision.

57. Defendant Superintendent, Federal Prison Camp, Allenwood, Pennsylvania, is the federal official having immediate custody over plaintiff, and is named in his official capacity, pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

STATEMENT OF CLAIM

58. Plaintiff has been denied parole on criteria inappropriate for a person, like plaintiff, sentenced under the provisions of 18 U.S.C. § 4208(a)(2) (1970), where parole is intended to be granted only on the basis of the prisoner's institutional performance and the Board's expectation that the prisoner will be able to live within

the law upon release. The criteria applied to plaintiff are those applied in all "adult cases," irrespective of the fact that sentence was imposed under 18 U.S.C. § 4208(a)(2) (1970).

59. Plaintiff has been denied parole on irrational criteria, and realleges the allegations of paragraphs 25-48 of the complaint heretofore filed.

60. Plaintiff has been denied parole on criteria inconsistent with the present parole statute, which requires the parole decision to be made after an inquiry into "the nature and circumstances of the offense and the history and characteristics of the prisoner." 18 U.S.C. § 4206(a) (1976). Contrary to this standard, plaintiff has been denied parole because he was convicted of an offense which the parole commission believed "involved extortion."

61. The decision to deny parole to plaintiff is arbitrary and capricious, in that

a. he was not seriously considered for parole only on the basis of his institutional performance and the Board's expectation of his ability to live within the law upon release, as required by 18 U.S.C. § 4208(a)(2) (1970), and

b. plaintiff was not convicted of an offense which "involved extortion." At plaintiff's trial, the jury was instructed to return a verdict of guilty absent "proof of any specific acts on the part of the public officials demonstrating force, threats, or the use of fear." (Trial transcript at 7536-37) All that was required was proof that money had been obtained from retail liquor dealers by police officers exploiting their official position. (Ibid) This offense, while punishable by 18 U.S.C. § 1951, is something other than "extortion."

WHEREFORE plaintiff requests that the Court direct issuance of a writ of habeas corpus, directing the Superintendent, Federal Prison Camp, Allenwood, Pennsylvania, to forthwith release Geraghty, upon such conditions as the Court may deem appropriate.

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 76-1467

JOHN M. GERAGHTY, PETITIONER

v.

UNITED STATES PAROLE COMMISSION, ET AL., RESPONDENTS

RETURN AND ANSWER

COME NOW the respondents, by and through their attorneys, and make the following return and answer to the amended petition for writ of habeas corpus.

A.

The respondents answer the numbered paragraphs of the petition as follows:

1. The allegations of this paragraph set out the jurisdictional bases for this case, to which no answer is required; but to the extent that an answer may be required, those allegations are denied.

2-4. Admitted.

5. The allegations of this section state conclusions of law regarding class certification, to which no answer is required; but to the extent that an answer may be required, those allegations are denied.

6-14. Admitted.

15. Respondents admit that petitioner's administrative appeal has been decided and that the decision was to affirm the earlier parole denial.

16-18. Admitted.

19-24. The allegations in these paragraphs state conclusions of law, to which no answer is required; but to the extent that an answer may be required, those allegations are denied.

25-28. Admitted.

29. Denied.

30-32. Admitted.

33-35. Denied.

36. Admitted insofar as it is alleged that offense severity and likelihood of success on parole were rated subjectively in the initial YCA study. Denied insofar as it is alleged that those are the only two factors which the Board chose to determine prospective parole policies. Answering further, respondents would show that the factor of institutional conduct was also chosen as one of the factors for parole decisions under the guidelines.

37. With respect to the first sentence of this paragraph, respondents admit that the salient factor score was adopted to eliminate the totally subjective estimation of parole prognosis. Answering further, however, respondents would show that the salient factor score may be overriden where it is contradicted by the Parole Commission's clinical evaluation of parole prognosis. The allegations in the second sentence of this paragraph are denied. Answering further respondents would show that the examples of offenses on the severity scale of the guidelines are objective standards by which the *ad hoc* judgment of an individual's offense severity is measured.

38-40. Admited.

41. The allegations of this paragraph state a conclusion of law, to which no answer is required; but to the extent that an answer may be required, those allegations are denied.

42. Denied.

43-45. Admitted.

46. Denied.

47. The allegations of this paragraph state a conclusion of law, to which no answer is required; but to the extent that an answer may be required, those allegations are denied.

48. Admitted.

49-52. The allegations in these paragraphs state conclusions of law, to which no answers are required; but to the extent that answers may be required, those allegations are denied.

53. Denied.

54-57. Admitted.

58. The allegations in the second sentence of this paragraph are admitted. The allegations in the first sentence state a conclusion of law, to which no answer is required; but to the extent that an answer may be required, those allegations are denied.

59-61. The allegations in these paragraphs state conclusions of law, to which no answers are required; but to the extent that answers may be required, those allegations are denied.

All allegations in the petition not hereinbefore expressly admitted or denied are hereby denied.

B.

In the two rule making proceedings in which the Board of Parole and Parole Commission invited public comments on proposed regulations, including the guidelines, neither petitioner nor his attorney submitted any comment. Therefore, to the extent that petitioner challenges the validity of the parole guidelines, the petition should be dismissed for failure to exhaust administrative remedies.

C.

Certification of this case as a class action would be inappropriate for the reasons stated in the attached brief.

D.

For the reasons stated in the attached brief, the petition fails to state a claim upon which relief may be granted.

WHEREFORE, respondents pray that the petitioner's request for class certification and the petition for writ

of habeas corpus be denied and that the case be dismissed.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 76-1467

JOHN M. GERAGHTY, individually and
on behalf of a class, PLAINTIFF-PETITIONER

-vs-

UNITED STATES PAROLE COMMISSION, ET AL.,
DEFENDANTS-RESPONDENTS

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, by counsel, moves the Court to grant summary judgment in his behalf against defendant United States Parole Commission, and declare that the "guidelines for decisionmaking," 28 C.F.R. § 2.20, are unlawful and direct the Parole Commission to promulgate regulations which are consistent with the Parole Commission and Reorganization Act of 1976, Public Law 94-233 (March 15, 1976). This motion is based on the pleadings, affidavits, and evidentiary material on file, including the three reports identified in paragraph 30 of the complaint, copies of which are appended hereto. Grounds to support this motion are set out in a brief filed with this motion.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Civil No. 76-1467

[Filed April 15, 1977]

JOHN M. GERAGHTY, individually and
on behalf of a class, PLAINTIFF-PETITIONER

—vs.—

UNITED STATES PAROLE COMMISSION, ET AL.

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that John M. Geraghty, individually and on behalf of a class, hereby appeals to the United States Court of Appeals for the Third Circuit from that part of the final decision of this court entered in the above captioned cause on the 24th day of February, 1977 relating to the motion for class certification, and to the denial of relief on Count I of the complaint.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1679

JOHN M. GERAGHTY, PETITIONER-APPELLANT

v.

UNITED STATES PAROLE COMMISSION, ET AL.,
RESPONDENTS-APPELLEES

No. 77-1858

JOHN M. GERAGHTY, PETITIONER

v.

UNITED STATES PAROLE COMMISSION, ET AL.,
RESPONDENTS-APPELLEES

ELIEZER BECHER, INTERVENOR-APPELLANT

MOTION TO DISMISS APPEALS

COME NOW the appellees, by their attorneys, and move that these consolidated appeals be dismissed. The factual and legal bases for this motion are set out below.

FACTS

Petitioner, John M. Geraghty, was convicted in the United States District Court for the Northern District of Illinois for the offenses of conspiracy to commit extortion, 18 U.S.C. § 1951, and false declarations to a grand jury, 18 U.S.C. § 1623. On appeal, petitioner's conviction was affirmed. *United States* v. *Braasch*, 505 F.2d 139 (7th Cir. 1974). The United States Supreme Court denied certiorari, 421 U.S. 910 (1975). After initially being sentenced to a term of 48 months, petitioner's sentence was reduced to 30 months under Rule 35 of the Federal Rules of Criminal Procedure. *United*

States v. *Braasch*, No. 72 CR 979 (N.D. Ill., Oct. 9, 1975), *aff'd*, 542 F.2d 442 (7th Cir. 1976). Petitioner's motion for further relief pursuant to 28 U.S.C. § 2225 was denied on December 21, 1976. *Geraghty* v. *United States*, No. 76 C 4215 (N.D. Ill.).

Petitioner Geraghty was denied parole on July 7, 1976, pursuant to the published parole guidelines, 28 C.F.R. § 2.20. On September 15, 1976, petitioner Geraghty filed this action in the United States District Court for the District of Columbia, challenging the Parole Commission and Reorganization Act, 18 U.S.C. § 4201 et. seq. (1976), the parole guidelines promulgated by the Commission, *supra*, and the Parole Commission's decision denying petitioner's release on parole. The Honorable Joseph C. Waddy, District Judge, construed the action as a petition for a writ of habeas corpus, and ordered it transferred to the Middle District of Pennsylvania. There, on February 24, 1977, the Honorable R. Dixon Herman, District Judge, denied the petition for a writ of habeas corpus, and also denied petitioner Geraghty's motion to certify the case as a class action. *Geraghty* v. *Parole Commission*, 429 F. Supp. 737 (M.D. Pa. 1977). On April 15, 1977, Geraghty filed a timely notice of appeal. Geraghty's appeal is docketed as No. 77-1679 in this Court.

After Geraghty's notice of appeal had been filed, and after the sixty-day period for filing the notice had expired, appellant Becher filed a petition to intervene after judgment pursuant to Rule 24(a) and (b), Fed.R.Civ. Pro. On April 28, 1977. Becher sought to intervene "only to insure that the Court of Appeals is presented with a live controversy with respect to the legality of the 'guidelines for decisionmaking,' 28 C.F.R. § 2.20." *Reply Memorandum in Support of Petition to Intervene After Judgment* at 1. On May 11, 1977, Judge Herman dismissed for lack of jurisdiction appellant's petition to intervene, on the grounds that the filing on April 15 of the notice of appeal had divested the district court of further jurisdiction in this case. Appellant Becher filed

a notice of appeal on June 9, 1977. Becher's appeal is docketed as No. 77-1858 in this Court.

On June 30, 1977, petitioner Geraghty was mandatorily released from prison, having completed the service of his sentence less good time. 18 U.S.C. § 4163.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 78-572

UNITED STATES PAROLE COMMISSION, ET AL., PETITIONERS

v.

JOHN M. GERAGHTY

ORDER ALLOWING CERTIORARI. Filed March 5, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is set for oral argument in tandem with No. 78-904, *Deposit Guaranty National Bank* v. *Robert L. Roper, et al.*

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No. 78-572

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES PAROLE COMMISSION, et al.,

Petitioners,

vs.

JOHN M. GERAGHTY

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BRIEF OF JOHN M. GERAGHTY IN OPPOSITION

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OCTOBER TERM, 1978

No. 78-572

UNITED STATES PAROLE COMMISSION, et al.,
Petitioners,

vs.

JOHN M. GERAGHTY

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF JOHN M. GERAGHTY IN OPPOSITION

John M. Geraghty, on behalf of all federal prisoners who have been or who will be denied parole through application of the federal parole guidelines, files the following in opposition to the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App. 1a-73a) is reported at 579 F.2d 238 (3d Cir. 1978). The opinion of the District Court (Pet.App. 77a-93a) is reported at 429 F.Supp. 737 (M.D.Pa. 1977).

JURISDICTION

The judgment of the Court of Appeals was entered on March 9, 1978; rehearing was denied on May 8, 1978. The petition for writ of certiorari was timely filed, by virtue of two extensions of time, on October 5, 1978. The petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May an order refusing to allow a case to proceed as a class action be reviewed on an appeal from a final decision of the case, irrespective of the status of the personal claim of the original plaintiff, when the existence of an actual controversy between the defendants and the unnamed members of the plaintiff class is undisputed?

2. Whether, on the facts of this case, the Court of Appeals erred in reversing the District Court's adverse class determination and remanding the case for further consideration of the class issue?

3. Did the Court of Appeals, in reversing the grant of summary judgment, correctly conclude that if on remand the District Court determines that the case should be certified as a class action, the plaintiff class is entitled to a trial on the merits of their detailed factual allegations that the federal parole guidelines are unlawful or unconstitutional, either on their face or as applied?

STATEMENT

In 1973, the federal parole board adopted[1] explicit parole release criteria—the parole "guidelines"—for adult prisoners.[2] Because these guidelines are "loosely based" upon the board's policies in Youth Correction Act, cases[3]

---

[1] The parole guidelines were first issued on November 19, 1973. 38 Fed.Reg. 31942 (1973). Following *Pickus* v. *United States Board of Parole*, 507 F.2d 1103 (D.C. Cir. 1974), which held that promulgation of the guidelines was governed by the publication and notice standards of the Administrative Procedure Act, 5 U.S.C. §§701-706, the guidelines were repromulgated on an emergency basis, 39 Fed.Reg. 45296 (1974), and were reissued on September 5, 1975. 40 Fed.Reg. 41328. With the effective date of the Parole Commission and Reorganization Act of 1976, Pub.L. 94-233 (March 15, 1976), the Parole Commission repromulgated the guidelines on an emergency basis. 41 Fed. Reg. 19330-31, 19341 (1976). Subsequent revisions appear at 41 Fed.Reg. 37322 (1976), 42 Fed.Reg. 12045 (1977), 42 Fed.Reg. 31786 (1977) and 42 Fed.Reg. 52399 (1977). The most recent proposed changes in the guidelines were published on October 11, 1978. 43 Fed.Reg. 46859-67 (1978).

[2] Explicit parole release criteria were held to be constitutionally required in *Childs* v. *United States Board of Parole*, 371 F.Supp. 1246 (D.D.C. 1973). The parole board acquiesced in that portion of the district court's decree. See 511 F.2d 1270, 1273-74 (D.C. Cir. 1974) (affirming other portions of the decree which had been challenged by the parole board).

[3] In its answer to the complaint in this case, the Parole Commission admitted that the present guidelines are "loosely based" on the parole board's policies in Youth Correction Act (18 U.S.C. §5005 et seq.) cases. This YCA policy was of dubious legality. Rather than making "execution of sentence . . . fit the person, not the crime for which he was convicted," *Dorszynski* v. *United States*, 418 U.S. 424, 434 (1974), the parole board was basing its YCA release decisions primarily upon a subjective judgment of offense severity. P. Hoffman, *Paroling Policy Feedback* 16 (NCCD Parole Decisionmaking Project Supp.Rep. No. 8, 1973). In its answer, the Commission also admitted that Hoffman, *supra*, is one of three reports which describe the creation of the guidelines.

in which there is no judicially set length of sentence,[4] the adult guidelines make the parole release decision depend primarily on whether the prisoner has served a "customary length of imprisonment" which is not related to the actual sentence imposed. This "customary length of imprisonment" exceeds the actual sentence imposed on at least 65% of all persons convicted of federal offenses,[5] and in less than seven percent of all cases will parole be granted before a prisoner has served this "customary length of imprisonment."[6] Thus, for the 27% of all prisoners who receive "lenient" prison sentences, parole is routinely denied.[7]

[4] A committed youth offender may be released at any time after incarceration. 18 U.S.C. §5017(a).

[5] Approximately half of all persons convicted of federal offenses are sentenced to probation. See Administrative Office of the United States Courts, *Federal Offenders in the United States District Courts* 1970 41 (1972). For those sentenced to a term of probation, the "customary length of imprisonment," of course, is zero. As to persons sentenced to imprisonment, information provided by the Parole Commission in this case shows that almost 27% of persons who are eligible for parole are denied parole because their sentence is too short to allow them to serve the "customary length of imprisonment" of the guidelines. And according to a spokesman for the Office of Improvements in the Administration of Justice of the Department of Justice, "approximately 50 percent of the defendants sentenced to imprisonment . . . are eligible for parole at the time recommended in the guidelines . . ." Hearings on S. 1437 before the Subcomm. on Criminals Laws and Procedure of the Sen. Comm. on the Judiciary, 95th Cong., 1st Sess., pt. 12, at 9000 (1977).

[6] In fiscal year 1975, 91.3% of all prisoners were required to serve at least their "customary length of imprisonment" before being paroled. The percentage increased slightly to 93.2% in 1976 and was relatively unchanged in 1977 at 93.4%. B. Stone-Meierhoefer, *Workload and Decision Trends Statistical Highlights 10/74-9/77*, 10 (United States Parole Commission Research Unit Report Eighteen, 1977).

The plight of John M. Geraghty, the named plaintiff, is typical of the several thousand prisoners who each year are denied parole through application of the parole guidelines.[8] Geraghty initially received a 48 month sentence, imposed under the provisions of 18 U.S.C. §4208(a)(2) (1970).[9] Although this sentence was subsequently reduced to 30 months on a timely Federal Rule of Criminal Procedure 35 motion, see *United States* v. *Braasch*, 542 F.2d 442 (7th Cir. 1976), Geraghty was nonetheless denied parole because his "customary length of imprisonment" was set by the parole board as 36 to 48 months.

Geraghty believed that he, along with thousands of others, had been wrongfully denied parole, and with the assistance of counsel brought this action individually and on behalf of a class to challenge the legality of the guidelines. Geraghty sought a prompt determination of whether

[7] Information provided by the Parole Commission in this case shows that 6151 initial parole hearings were held from October, 1977 to March, 1978, and that in 1635 of those hearings, parole was denied because the prisoner would completely serve his sentence before he could serve the "customary length of imprisonment" of the guidelines.

[8] Approximately 10,000 prisoners are considered for parole each year. B. Stone-Meierhoefer, *supra* note 6, 1. The percentage of prisoners who are denied parole has varied from 41.2% in fiscal year 1975 to 46.7% in fiscal year 1976 to 55.9% in fiscal year 1977. Id. at 7.

[9] The Parole Commission admitted in its answer to the complaint that a prisoner sentenced under 18 U.S.C. §4208(a)(2) (1970) (renumbered as 18 U.S.C §4205(b)(2) in the 1976 amendment to the parole statute) is considered for parole under the same guidelines as a prisoner who received a regular adult sentence.

the case could proceed as a class action by filing a motion to certify the case as a class action with his complaint. In addition, Geraghty sought interim individual relief so that his personal claim would not be rendered moot by the impending expiration of his sentence.

Without ruling on Geraghty's motions,[10] the District Court for the District of Columbia[11] transferred the case to the Middle District of Pennsylvania, where Geraghty was then confined. Following transfer of the case, Geraghty renewed his request for class certification and his application for interim relief.[12] The district court, however, postponed ruling on the class motion until it was ready to announce its decision on defendants' motion for summary judgment. (The district court never ruled on the application for interim relief.)

In the view of the district court, the case was a habeas corpus action (App. 80a), to which Civil Rule 23 was ap-

[10] Geraghty's attempt to remedy this inaction by recourse to a writ of mandamus was denied without opinion. *In re Geraghty,* No. 76-1975. D.C. Cir., November 16, 1976.

[11] The case had been filed in the District of Columbia as a related case to *Cale* v. *Attorney General,* No. 75-1822 (D.D.C.), *appeal dismissed as moot,* 543 F.2d 416 (D.C. Cir. 1976) (table). *Cale* was brought as a "test case" by four of Geraghty's codefendants, and raised the same issues subsequently advanced by the same counsel on behalf of Geraghty.

[12] Geraghty also filed an amendment to his complaint, adding an individual habeas corpus claim and joining the Warden of the Allenwood Prison Camp as a party. It is this amendment which brought into the case the issues which "relate solely to plaintiff's individual case" mentioned in the opinion of the district court (App. 82a) as grounds for refusing to certify the case as a class action. Geraghty excluded the denial of individual habeas corpus relief from his notice of appeal.

plicable only "by analogy." (App. 81a-82a.) Under this analogy, class treatment was denied on the ground that it was "neither necessary nor appropriate." (App. 82a.) Class certification was not "necessary," the district court reasoned, because the class claims could be litigated in an individual action. (App. 82a.) Class status was deemed to be inappropriate because two of the issues raised in Geraghty's amendment to the complaint "have no class-wide applicability" (id.),[13] because "not all members of the class have the same interest as plaintiff" (id.), and because the district court "does not have habeas corpus jurisdiction over all members of the proposed class." (App. 83a.)

On the merits, the district court rejected all of Geraghty's substantive contentions. (App. 83a-92a.) Geraghty filed a timely notice of appeal. Thereafter, Eliezer Becher, another prisoner who had been denied parole through application of the guidelines and who was represented by Geraghty's counsel, sought to intervene. As Becher explained in his petition to intervene, he sought to join in the case to insure that the legal issues raised by Geraghty on behalf of the class "will not escape review in the appeal in this case." The district court denied the petition to intervene, concluding that the filing of Geraghty's notice of appeal had divested it of jurisdiction. Becher then filed a timely notice of appeal from the denial of intervention, and the two appeals were consolidated.

Although the Court of Appeals expedited the appeals, its decision came after Geraghty and Becher had satisfied their sentences. In a comprehensive opinion, Judge Adams, writing for a unanimous court, held that Geraghty's release from custody did not render the case moot if the district

[13] See note 12 *supra.*

court had improperly refused to certify the case as a class action. (App. 10a-28a.) Turning to the class issue, the Court of Appeals held that the district court had erred in viewing the case as a habeas corpus proceeding (App. 7a-10a), and in concluding that Civil Rule 23 was applicable only "by analogy." Noting that Rule 23 did not include a "necessary" standard, the Court of Appeals held that the district court had erred in relying on this rationale in refusing to allow the case to proceed as a class action. (App. 28a.) The case was therefore remanded to the district court with instructions to determine if the proposed class (or, if necessary, subclasses) satisfied the requirements of Rule 23(a). (App. 32a & n. 66.)

The Court of Appeals viewed the merits of the substantive class claims only insofar as it was necessary to determine that a remand would not "improvidently dissipate judicial effort," which would be the case if the "district court were correct in its determination that Geraghty's substantive contentions are devoid of merit." (App. 32a-33a.) The Court noted that the material facts were in dispute (App. 36a n. 75), and followed the ordinary rule of viewing the evidence in the light most favorable to Geraghty, the party who had opposed the grant of summary judgment. (App. 36a.)

Geraghty's substantive contentions were analyzed by the Court of Appeals in two categories--whether the parole guidelines are contrary to the parole statute (App. 33a-54a), and whether, as applied to certain prisoners, the guidelines are of *ex post facto* effect. (App. 46a-65a.) After a careful analysis of the language of the parole statute (App. 36a-39a), of its legislative history (App. 39a-46a), and of the constitutional problems which would be present if the guidelines "function as Geraghty alleges" (App. 48a) and "as automatically as Geraghty alleges" (App. 52a), the Court of Appeals concluded that the question of whether the guidelines are consistent with the statute "may be disposed of only on a full record." (App. 54a.) The *ex post facto* claim was also held to be incapable of resolution on the present record. (App. 65a.)

Rehearing and a suggestion that the case be reheard *in banc* were denied without opinion and without a vote of the Court. Following issuance of the judgment of the Court of Appeals, the District Court received memoranda from the parties on the class issue, held a preliminary hearing on the class question, but has withheld ruling either on the class motion or on plaintiff's motion to add additional plaintiffs.

REASONS FOR DENYING THE PETITION

All that is involved at the present stage of this case is a decision of the Court of Appeals that if the district court determines that a class should be certified, the plaintiff class is entitled to a trial to seek to prove its allegations about the creation and application of the federal parole guidelines. Following a trial, this case may well result in a declaration that the parole guidelines are unlawful, and review by this Court may well be appropriate at that juncture. But review at the present interlocutory stage of the case will require the Court to adjudicate weighty questions on the basis of facts which the plaintiff class may be unable to establish. Certiorari should therefore be denied as to the substantive issues subsumed in questions three and four of the petition for writ of certiorari.

Nor should certiorari be granted to review the procedural questions raised in the petition. The decision of the Court of Appeals that the district court's adverse class determination could be reviewed on appeal from the final decision of the case is consistent with prior and subsequent decisions of this Court. (The assertedly contrary view of the Seventh Circuit was abandoned in a decision of that court announced after the filing of the petition.) The other question presented in the petition, relating to a potential need for subclasses after remand, is not presented by this case.

I.

Petitioners do not deny that there continues to be a live controversy between the unnamed members of the putative class and the Parole Commission.[14] Nonetheless, petitioners argue that the district court's refusal to allow the case to proceed as a class action may not be reviewed on appeal if the personal claim of the original plaintiff has become moot.

[14] Several members of the putative class have sought to be substituted as respondents in this Court or, alternatively, to intervene. This motion, filed on November 6, 1978, has not as yet been ruled upon. The same prospective additional respondents-petitioning intervenors have also applied to the district court to be added as plaintiffs.

This mootness argument is identical to the theory rejected by the Court in *United Air Lines* v. *McDonald,* 432 U.S. 385 (1977). One issue in that case was whether original plaintiffs in a class action may seek review of an adverse class determination after they had settled their individual claims.[15] This question was answered in the affirmative. "The District Court's refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs, as United concedes." Id. at 393 (footnote omitted).

The decision of the Court of Appeals in this case is faithful to *McDonald,*[16] and is required by this Court's subsequent decisions in *Coopers & Lybrand* v. *Livesay,* 46 U.S. L.W. 4757 (June 21, 1978) and *Gardner* v. *Westinghouse,* 46 U.S.L.W. 4761 (June 21, 1978). Petitioners would limit these cases, and their holding that an adverse class determination may absent an interlocutory appeal pursuant to 28 U.S.C. §1292(b) be reviewed only on appeal from the final decision of the case, to situations where an individual claim is "inherently temporary in nature and capable of

[15] This question was preliminary to the other issue in *McDonald* —whether unnamed class members may intervene after judgment to seek review of an adverse class determination when the original plaintiffs have refused [redacted] so. Obviously, if the original plaintiffs could not appeal, the unnamed class members could not intervene to do so. See 432 U.S. at 400 (Powell, J., dissenting).

[16] Petitioners' assertion that "no question of mootness was involved" in *McDonald* (Pet. 18 n. 11) is plainly wrong. See note 13 *ante*.

evading judicial review even at the trial court level." (Pet. 17.) But neither *Coopers & Lynbrand* nor *Gardner* involved a claim which is "inherently temporary in nature." *Coopers & Lynbrand* involved allegations of long completed violations of the federal securities laws and *Gardner* was an employment discrimination action. In both cases, the Court relied on *United Air Lines* v. *McDonald, supra,* and held that review of the district court's adverse class determination would be subject to "effective review after final judgment at the behest of the named plaintiff or intervening class members." *Coopers & Lynbrand,* 46 U.S.L.W. at 4759; *Gardner,* 46 U.S.L.W. at 4762 n. 6.

Finally, there is no substance to petitioners' assertion (Pet. 15-16) that the decision of the Court of Appeals is in "direct conflict" with a decision of the Seventh Circuit, *Winokur* v. *Bell Federal Savings & Loan Association,* 560 F.2d 271 (7th Cir. 1977). Subsequent to the filing of the petition for writ of certiorari, the conflicting dicta in *Winokur* was repudiated by the Seventh Circuit in *Susman* v. *Lincoln America Corp.,* ..... F.2d ....., No. 78-1293 (7th Cir. October 23, 1978), where the Seventh Circuit expressly agreed with the decision of the Third Circuit in this case. (*Susman,* slip op. 7.)

II.

The second question posed in the petition for writ of certiorari is not presented in this case and plainly misconceives the decision of the Court of Appeals. Contrary to petitioners' assertion, this case does not present the question of whether a district court must *sua sponte* seek to construct subclasses "even though the plaintiff has not requested it to do so." (Pet. 19.)

First, plaintiff had no opportunity to suggest that subclasses be created. Although plaintiff repeatedly requested that the district court comply with Civil Rule 23(c)(1) and rule on the class motion as soon as practicable, the district court refused to rule on plaintiff's motion to certify the case as a class action until it was ready to announce its decision on the merits. If the district had ruled on the class motion prior to its decision on the merits, and had denied class status because the class as originally proposed was overinclusive, it is obvious that the plaintiff would have proposed a redefinition of the class.

Second, the Court of Appeals did not hold that the district court should have considered subclassing because of conflicts within the class proposed by plaintiff. On the contrary, the Court of Appeals carefully noted that "it is not clear that a divergence of interest exists." (App. 31a.) While the Court of Appeals did discuss the use of subclassing to eliminate conflicting interests within a class, it did so only in the context of providing guidance for the district court on remand.

III.

Questions three and four of the petition relate to Geraghty's claims that the parole guidelines are contrary to the Parole Commission and Reorganization Act of 1976, Pub.L. 94-233 (March 15, 1976)[17] and, as applied to certain pris-

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[17] Contrary to petitioners' assertion (Pet. 28), this question was expressly reserved in *Garcia* v. *United States Board of Parole,* 557 F.2d 100, 107 n. 7 (7th Cir. 1977), where Geraghty appeared as an amicus curiae. Nor was this question resolved by the dicta cited by petitioners (Pet. 28) in *Banks* v. *United States,* 553 F.2d 37, 40 (8th Cir. 1977).

oners, are of *ex post facto* effect.[18] The Court of Appeals held that these claims could not be resolved on the present record "since the Parole Commission has presented contradictory material, and since a large part of Geraghty's proof is inferential." (App. 36a n. 75.) Accordingly, the case was remanded to allow the plaintiff class—if one is certified by the district court—to prove Geraghty's recapitulation of the function and genesis of the guidelines" (App. 46a), and to resolve the dispute as to "the actual functioning of the guidelines." (App. 54a.)

Petitioners would deprive the plaintiff class of a full and fair opportunity to prove these allegations by referring the Court to a text and an article "[f]or a history of this development and a description of the [parole guideline] system." (Pet. 25 n. 19.) These secondary sources, of course, were not developed after an adversary hearing, and—as will be shown in the district court—these secondary sources are seriously in error about the function and genesis of the guidelines.

In the district court, the plaintiff class intends to prove that the parole guidelines implemented a new policy for parole release decisionmaking, and that this new policy was based on an incorrect view of federal criminal law. The plaintiff class will also show that the reason why length of sentence is not included in the present guidelines is because these guidelines were derived from a study of release policies in Youth Correction Act (18 U.S.C. §5005 et seq.)

[18] As the Court of Appeals recognized (App. 61a-62a), the asserted conflict (Pet. 30) between the decision on the ex post facto issue in this case and *Ruip* v. *United States*, 555 F.2d 1331 (6th Cir. 1977), and *Shepard* v. *Taylor*, 556 F.2d 648 (2d Cir. 1977), is a disagreement about the facts—which are not reliably determined in those cases—rather than about the law.

cases, where there is no maximum sentence. As plaintiffs will show in the district court, it is possible to develop guidelines which weigh the actual sentence imposed, and that such guidelines have been fashioned for the parole systems in North Carolina, Virginia, Louisiana, and Missouri. These states adopted such guidelines because, unlike the federal parole board, the parole authorities in these states were not willing to ignore the statutory limitations on their powers.

In addition, the plaintiff class will demonstrate that the "customary lengths of imprisonment" of the parole guidelines bear no relation to the "customary length of imprisonment" served prior to adoption of the guidelines. The plaintiff class will prove that prior to adoption of the guidelines, the most significant factor in the parole release decision was the length of sentence imposed by the sentencing court. They will also show that under the guidelines, the parole release decision has been primarily dependent upon a mechanical and arbitrary predetermination of offense severity. The plaintiff class will also prove that the guidelines have, in general, enhanced the relative severity of sentences imposed for offenses committed prior to the adoption of the [illegible]A in 1976.

These complicated factual questions will involve a careful analysis of the often deceptive statistics pertaining to actual paroling policies before and after adoption of the guidelines. In addition, expert testimony will likely be required to aid the district court in understanding the pseudoscientific methodology underlying the federal parole guidelines, especially as it compares to the methodology used to fashion guidelines for other jurisdictions. There will also be a full adversarial hearing into the creation and applica-

tion of the guidelines. For example, while the Parole Commission continues to assert that the guidelines "are not intended to be used as a form of criminal code," 43 Fed.Reg. 46859, 46860 (October 11, 1978), we expect the evidence to show precisely the opposite, i.e., that the guidelines are in fact used as a form of criminal code.

It might be, of course, that the plaintiff class will be unable to prove all that it intends to prove. But if review is granted at this juncture, the Court must, under the rule of *United States* v. *Diebold*, 369 U.S. 654 (1962), view the record in the light most favorable to the plaintiff class, and the result might be to decide the case on the basis of facts which cannot be established. For this reason, certiorari should be denied, on "[t]he salutary principle that the essential facts should be determined before passing upon grave constitutional questions." *Polk Co.* v. *Glover*, 305 U.S. 5, 10 (1938).[19]

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

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January, 1979.

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[19] We assume that the questions which will ultimately be decided in this case will not be addressed in either *Bonnanno* v. *United States*, No. 77-1665, or *United States* v. *Addonizzio*, No. 78-156, petitions for certiorari granted December 11, 1978, since the prisoners in neither of these cases challenge the validity of the guidelines.

No. 78-572

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES PAROLE COMMISSION, ET AL., PETITIONERS

v.

JOHN M. GERAGHTY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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v.

JOHN M. GERAGHTY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

1. Respondent asserts "that there continues to be a live controversy between the unnamed members of the putative class and the Parole Commission" (Br. in Opp. 10). In an effort to preserve this "live controversy," respondent has filed in this Court a motion to substitute additional parties plaintiff or to permit intervention of five alleged members of the putative class.[1]

As a general matter, we do not oppose the substitution or intervention of any of the proposed intervenors who would be proper parties to the litigation if the case were not moot. Because Harry Cardillo, James Rust and James Taylor appear to possess claims of the type initially presented by respondent in this lawsuit, we do not object

[1]Respondent has filed a similar motion in the district court (Br. in Opp. 10 n.14).

to their participation in this case.[2] Even if substitution or intervention should be granted, however, the question of mootness presented in our petition for a writ of certiorari still would require resolution by this Court. The question would remain whether the addition, at this late date, of parties with live claims could recreate jurisdiction in a case where the claim of the individual litigant became moot and class action certification had been denied before the court of appeals' decision.

2. We take issue with respondent's contention (Br. in Opp. 11-12) that this Court's decisions in *Coopers & Lybrand* v. *Livesay*, No. 76-1836 (June 21, 1978), and *Gardner* v. *Westinghouse Broadcasting Co.*, No. 77-560 (June 21, 1978), support the ruling of the court of appeals in this case. Those cases hold that a district court's order denying class action certification is not appealable until after final judgment, unless the district court has certified its order for interlocutory review pursuant to 28 U.S.C. 1292(b). Nothing in *Coopers & Lybrand* or *Gardner* suggests that a named plaintiff such as respondent may appeal the denial of class action certification after his individual claim has become moot.

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[2]We do, however, oppose the addition of Millard V. Hubbard and David Gillis as parties plaintiff or intervenors. According to information contained in respondent's motion in the district court (see note 1, *supra*), Hubbard was sentenced by a federal district judge in the Northern District of Illinois in September 1972 to 10 years' imprisonment. But Hubbard is not yet serving his federal sentence. Instead, he is serving a state sentence previously imposed by an Illinois court. He is thus not currently subject to the federal parole authority and it does not appear that he soon will be. His challenge to the operation of the federal parole system therefore lacks ripeness, and his motion for intervention should be denied.

Gillis is incarcerated at a federal correctional institution in North Carolina. Since this case has never been certified as a nationwide class action (or even as a local class action), the addition of Gillis to this action would create unnecessary practical problems. See *Starnes* v. *McGuire*, 512 F. 2d 918, 929-931 (D.C. Cir. 1974).

3. Respondent also asserts (Br. in Opp. 13-16) that there is a factual dispute between the parties concerning the development and function of the Parole Commission's Guidelines and that a hearing is necessary to resolve this alleged dispute before this Court may review the court of appeals' determination concerning the validity of the Commission's Guidelines. We disagree.

a. As we have pointed out (Pet. 11-12, 23), the Commission concedes that it does not consider the length of a prisoner's sentence in making parole decisions under the Guidelines. Because there is no dispute about this, there is no need for a hearing. The question whether the Guidelines conflict with the Parole Commission and Reorganization Act because they do not take sentence length into account (Pet. 22-28) is thus squarely presented by this case.

b. In support of the contention that the Guidelines violate the Ex Post Facto Clause of the Constitution, respondent asserts (Br. in Opp. 15) that the customary release dates under the Guidelines "bear no relation to the 'customary length of imprisonment' served prior to adoption of the guidelines." The history and development of the Guidelines has been well documented (Pet. 25 n.19).[3] None of the sources that describe the formulation of the Guidelines supports respondent's assertion. Indeed, it has been reported by those involved in the establishment of the Guidelines that one of the principal factors used in determining appropriate customary release dates was the customary parole practice for various offender categories prior to the adoption of the Guidelines. See Gottfredson, Hoffman, Sigler & Wilkins, *Making*

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[3]See also pages 27-31 and 50-61 of our brief in *Bonanno* v. *United States*, No. 77-1665, and *United States* v. *Addonizio*, No. 78-156, cert. granted (Dec. 11, 1978). We have furnished copies of this brief to counsel for respondent.

Paroling Policy Explicit, 21 Crime & Delinquency 34, 38-39 (1975). As respondent himself alleged in his complaint (C.A. App. A13, para. 42), the Guideline' release dates are derived in large measure from previous parole practice.[4]

Moreover, even if the customary parole date for some offender categories has been lengthened since the adoption of the Guidelines, that would not establish any violation of the Ex Post, Facto Clause. The question whether changes in paroling policy could violate the Clause by increasing the average time served on unquestionably lawful sentences is entirely a matter of constitutional law. It can be resolved without further factual inquiry. As we stated in our petition (Pet. 29-30), the Commission, in assigning an offense severity rating, considers the particular circumstances of each case, and it may depart from the Guidelines in the exercise of its discretion. Respondent does not disagree with this position. As the Ninth Circuit recently stated in rejecting the claim that the Guidelines are an invalid ex post facto law (*Rifai* v. *United States Parole Commission*, 586 F. 2d 695, 698 (1978) (citations and footnote omitted)):[5]

> The Commission here was well within established statutory authority when it promulgated the guidelines. * * * The broad standards enunciated by Congress gave the Commission great discretion, and changes in the emphasis or de-emphasis of parole release considerations within the statutory scheme

[4]Although the Commission's answer (C.A. App. A39, para. 42) denied that the customary release dates under the Guidelines were obtained in the precise manner alleged by respondent, it has consistently asserted that the release dates were based to a large extent on prior practice.

[5]The decision in *Rifai* was rendered after our petition in this case was filed. It highlights the importance of resolving the conflict among the circuits presented by the decision in this case.

> were clearly authorized. The guidelines, therefore, are merely procedural guideposts, without the characteristics of laws.

For the reasons stated above and in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

JANUARY 1979

No. 78-572

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OCTOBER TERM, 1978

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PETITIONERS

v.

JOHN M. GERAGHTY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-73a) is reported at 579 F.2d 238. The opinion of the district court (Pet. App. 77a-93a) is reported at 429 F. Supp. 737.

JURISDICTION

The judgment of the court of appeals (Pet. App. 74a-75a) was entered on March 9, 1978. A petition for rehearing was denied on May 8, 1978 (Pet. App.

76a). On July 28, 1978, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to September 5, 1978, and on August 24, 1978, he further extended the time for filing a petition to October 5, 1978. The petition was filed on that date and was granted on March 5, 1979 (A.33). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this case became moot when the individual plaintiff's criminal sentence expired after class action certification had been denied by the district court.

2. Whether the district court abused its discretion in failing, *sua sponte*, to identify and certify an appropriate subclass after the court had properly determined that the plaintiff's claims were not representative of the class that had been proposed for certification.

3. Whether the Parole Commission's parole release guidelines or its decision-making practices under the guidelines violate the Parole Commission and Reorganization Act by failing to give consideration to the length of a prisoner's sentence in parole release determinations.

4. Whether application of the Commission's parole release guidelines to prisoners who were sentenced prior to the effective date of the guidelines is an unconstitutional ex post facto enhancement of criminal sentences.

CONSTITUTIONAL PROVISION, STATUTES, RULES AND REGULATIONS INVOLVED

1. Art. I, § 9, cl. 3 of the United States Constitution provides:

> No Bill of Attainder or ex post facto Law shall be passed.

2. The Parole Commission and Reorganization Act, 18 U.S.C. 4201-4218, provides in pertinent part:

A. 18 U.S.C. 4203:

> (a) The Commission * * * shall—
>
> (1) promulgate rules and regulations establishing guidelines for the powers enumerated in subsection (b) of this section and such other rules and regulations as are necessary to carry out a national parole policy and the purposes of this chapter;
>
> * * * * *
>
> (b) The Commission * * * shall have the power to—
>
> (1) grant or deny an application or recommendation to parole any eligible prisoner;
>
> (2) impose reasonable conditions on an order granting parole;
>
> (3) modify or revoke an order paroling any eligible prisoner; * * *.

B. 18 U.S.C. 4205:

> (a) Whenever confined and serving a definite term or terms of more than one year, a prisoner shall be eligible for release on parole after serving one-third of such term or terms or after serv-

ing ten years of a life sentence or of a sentence of over thirty years, except to the extent otherwise provided by law.

(b) Upon entering a judgment of conviction, the court having jurisdiction to impose sentence, when in its opinion the ends of justice and best interest of the public require that the defendant be sentenced to imprisonment for a term exceeding one year, may (1) designate in the sentence of imprisonment imposed a minimum term at the expiration of which the prisoner shall become eligible for parole, which term may be less than but shall not be more than one-third of the maximum sentence imposed by the court, or (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

* * * * *

C. 18 U.S.C. 4206:

(a) If an eligible prisoner has substantially observed the rules of the institution or institutions to which he has been confined, and if the Commission, upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner, determines:

(1) that release would not depreciate the seriousness of his offense or promote disrespect for the law; and

(2) that release would not jeopardize the public welfare;

subject to the provisions of subsections (b) and (c) of this section, and pursuant to guidelines

promulgated by the Commission pursuant to section 4203(a)(1), such prisoner shall be released.

* * * * *

(c) The Commission may grant or deny release on parole notwithstanding the guidelines referred to in subsection (a) of this section if it determines there is good cause for so doing * * *.

(d) Any prisoner, serving a sentence of five years or longer, who is not earlier released under this section or any other applicable provision of law, shall be released on parole after having served two-thirds of each consecutive term or terms, or after serving thirty years of each consecutive term or terms of more than forty-five years including any life term, whichever is earlier: *Provided, however,* That the Commission shall not release such prisoner if it determines that he has seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime.

D. 18 U.S.C. 4207:

In making a determination under this chapter (relating to release on parole) the Commission shall consider, if available and relevant:

(1) reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) presentence investigation reports;

(4) recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge; and

(5) reports of physical, mental, or psychiatric examination of the offender.

There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available.

E. 18 U.S.C. 4218(d):

Actions of the Commission pursuant to paragraphs (1), (2), and (3) of section 4203(b) shall be considered actions committed to agency discretion for purposes of section 701(a)(2) of title 5, United States Code.

3. Fed. R. Civ. P. 23 provides in pertinent part:

(a) * * * One or more members of a class may sue or be sued as representative parties on behalf of all only if * * * (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

* * * * *

(c) * * *

(c)(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

* * * * *

(4) When appropriate * * * (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

* * * * *

4. The pertinent portions of the guidelines adopted by the Parole Commission for parole release determinations, 28 C.F.R. 2.20, are reproduced in the appendix to the opinion of the court of appeals (Pet. App. 67a-73a).

STATEMENT

1. Following a jury trial in the United States District Court for the Northern District of Illinois, respondent was convicted of conspiracy to commit extortion through the use of his position as a vice squad officer of the Chicago police, in violation of 18 U.S.C. 1951,[1] and of making false declarations to a grand jury concerning his involvement in the extortion scheme, in violation of 18 U.S.C. 1623. On January 25, 1974, he was sentenced to concurrent terms of four years' imprisonment on the conspiracy count and one year's imprisonment on the false declarations count. The convictions were affirmed on appeal. *United States* v. *Braasch*, 505 F.2d 139 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975).

Respondent obtained a reduction in his sentence to 30 months' imprisonment (A. 20; Pet. App. 77a & n. 2). The district court ordered this reduction, pur-

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[1] The conspiracy was alleged to have occurred during 1966 to 1970. *United States* v. *Braasch*, 505 F.2d 139, 141 (7th Cir. 1974), cert. denied, 421 U.S. 910 (1975).

suant to Fed. R. Crim. P. 35, because it concluded that application to respondent of the parole release guidelines (28 C.F.R. 2.20), which had been promulgated by the Parole Commission two months before the initial sentence was imposed, would frustrate the expectation of the sentencing court. *United States* v. *Braasch*, No. 72 CR 979 (N.D. Ill. Oct. 1, 1975), appeal dismissed and mandamus denied, 542 F.2d 442 (7th Cir. 1976).[2]

Respondent then applied for release on parole. On January 13, 1976, his application for parole was denied with the following explanation (A. 5-6; Pet. App. 5a):

> Your offense behavior has been rated as very high severity. You have a salient factor score of 11. You have been in custody for a total of 4 months. Guidelines establish by the Board for adult cases which consider the above factors indicate a range of 26-36 months to be served before release for cases with good institutional program performance and adjustment. After review of all relevant factors and information presented, it is found that a decision at this consideration outside the guidelines does not appear warranted.

Respondent's second application for parole was denied for similar reasons on July 7, 1976, and he was continued without further consideration of parole until

[2] Respondent's motion for further relief pursuant to 28 U.S.C. 2255 was denied on December 21, 1976. *Geraghty* v. *United States*, No. 76 C 4215 (N.D. Ill.) (A. 31).

his release from prison on accumulated good time credits (Pet. App. 6a).

2. On September 15, 1976, respondent instituted this civil action in the United States District Court for the District of Columbia, seeking declaratory and injunctive relief (A. 1, 3-16; Pet. App. 78a). Respondent alleged that the Parole Commission's guidelines are invalid under the Parole Commission and Reorganization Act, 18 U.S.C. 4201-4218, and that they also violate the ex post facto prohibition of the Constitution by authorizing the Commission to make deferred sentencing decisions (Pet. App. 83a-84a).[3] Respondent moved for certification of the case as a class action on behalf of "all federal prisoners who are or who will become eligible for release on parole" (A. 17).

On November 12, 1976, the action was transferred to the Middle District of Pennsylvania, where respondent was then incarcerated (Pet. App. 78a).[4]

[3] Respondent alleged that he was scheduled to be discharged from custody on June 30, 1977 (A. 7, 21). He was released from confinement on that date (A. 32; see page 11, *infra*).

[4] The district court in the District of Columbia construed the action as a petition for a writ of habeas corpus, and thus transferred the case to the Middle District of Pennsylvania pursuant to 28 U.S.C. 1406 and 2255 (A. 31; Pet. App. 78a, 79a & n.3). The district court for the Middle District of Pennsylvania noted that jurisdiction for the declaratory and injunctive relief sought by petitioner ordinarily would rest on 28 U.S.C. 1331 and 1361. The court held, however, that because the relief sought is "in effect, a request for a ruling that [respondent] is entitled to release on parole" (Pet. App.

Respondent moved for summary judgment (A. 28). On February 24, 1977, the district court denied respondent's request for class certification and dismissed the action. The court found class certification inappropriate because "not all members of the [proposed] class have the same interest" in challenging the validity of the parole guidelines (Pet. App. 83a). The court pointed out that some prisoners may find their actual or expected parole release date advanced by virtue of the guidelines and thus would not share respondent's position that the guidelines improperly delay release (*ibid.*).[5] The court also rejected respondent's contention that class certification should be granted merely "to ensure that the legal issues presented" are not made moot by the expiration of respondent's criminal sentence (*id.* at 82a).

80a), habeas corpus is the exclusive remedy (*ibid.*, citing, *e.g.*, *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973)).

[5] The district court also held that class certification was inappropriate for other claims that would not be shared by all members of the class. Two issues—the classification of respondent's offense as extortion under the guidelines and respondent's access to certain of the Commission's files—were found by the court to relate solely to the circumstances of respondent's individual case (Pet. App. 82a). Similarly, respondent's argument that the guidelines are inconsistent with the provisions of 18 U.S.C. (1970 ed.) 4208(a)(2) (now 18 U.S.C. 4205(b)(2)), under which respondent was sentenced, was found not to have applicability to those members of the proposed class who were sentenced under different statutes (Pet. App. 83a).

Turning to the merits, the court held that the parole guidelines are consistent with the provisions of the Parole Commission and Reorganization Act and that the guidelines do not offend the Ex Post Facto Clause of the Constitution. The court noted that the guidelines are consistent with the requirements of the Act that the parole decision be made "pursuant to guidelines promulgated by the Commission," 18 U.S.C. 4206(a), and be based on the " 'nature and circumstances of the offense *and* the history and characteristics of the prisoner' " (Pet. App. 87a) (emphasis in original). Moreover, the court concluded, the adoption of the guidelines did not effect an ex post facto enhancement of respondent's sentence because parole involves the administrative implementation of the sentence and "is not a form of sentencing or a modification of sentence" (*id.* at 85a n.10, citing *Roach* v. *Board of Pardons and Paroles*, 503 F.2d 1367, 1368 (8th Cir. 1974)).

3. Respondent filed a timely notice of appeal (A. 29). On June 30, 1977, while the appeal was pending in the court of appeals, but before any briefs had been filed, respondent was released from prison as a result of accumulated good time credits after serving a total of 22 months of his sentence. (A. 32). Petitioners then moved to dismiss the case as moot (A. 30). The court of appeals deferred disposition of this motion pending consideration of the appeal on the merits. On March 9, 1978, more than eight months after respondent had been released, the

court of appeals reversed the judgment of the district court and remanded for further proceedings.[6]

a. The court acknowledged that respondent's case became moot when he was released. Because the district court had declined to certify a class action in this case, there was neither a class nor a litigant with a live controversy before the court of appeals. The court stated, however, that if a class action had been certified by the district court, the mootness of respondent's personal claim would not have precluded adjudication on behalf of the class (Pet. App. 20a-21a). And, the court went on, if a proper class *could* have been certified, and the district court erred in failing to do so, the case could be remanded for

[6] On April 28, 1977, after respondent's notice of appeal had been filed (and after the 60-day period for filing a notice of appeal expired (Fed. R. App. P. 4a)), Eliezer Becher, a federal prisoner who had been denied parole, filed a motion in the district court to intervene after judgment, pursuant to Fed. R. Civ. P. 24(a) and (b) (A. 2, 31). The court denied the motion, reasoning that the filing of respondent's notice of appeal had divested the district court of jurisdiction (A. 2, 31). Becher appealed from the denial of his motion to intervene (A. 2); and his appeal was consolidated with this action. After the appeals were argued, but before the court of appeals' decision was rendered, Becher was released on parole. The court of appeals nonetheless remanded Becher's motion to intervene to the district court "for a determination as to the reasons for his failure to intervene earlier and an examination of the potential prejudice, if any, which might result from such intervention" (Pet. App. 11a n.21; citations omitted). Becher has apparently abandoned any interest in the litigation, however, for he failed to pursue his motion to intervene in the district court proceedings on remand. See also note 13, *infra*.

class certification to preserve jurisdiction (*id.* at 28a).

With regard to the class certification question, the court of appeals agreed with the district court that the proposed class was too broad and that respondent's interests might conflict with those of other class members (Pet. App. 29a, 31a-32a). The court held, however, that appropriate subclasses may exist and that the district court erred by not considering, *sua sponte*, the certification of such subclasses (*id.* at 32a). The court accordingly reversed the denial of class certification and remanded for the "evaluation of the proper subclasses" (*ibid.*).[7]

b. Stating that a remand for consideration of class certification would produce an improvident dissipation of judicial effort if the district court had properly disposed of the merits of the case (Pet. App.

[7] The court held that the district court had jurisdiction in this case under 18 U.S.C. 4218(c) and the Administrative Procedure Act, 5 U.S.C. 701-706. But because the complaint challenges not the manner in which the guidelines were promulgated but their substantive validity, 18 U.S.C. 4218(c) provides neither jurisdiction nor any substantive remedy. To the contrary, 18 U.S.C. 4218(d) insulates release decisions from judicial scrutiny. Moreover, this Court held in *Califano* v. *Sanders*, 430 U.S. 99 (1977), that the APA is not a jurisdictional statute. We have not challenged the jurisdictional holdings of the court of appeals, however, because respondent's allegation of jurisdiction under 28 U.S.C. 1331 is sufficient in this case. See *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 607-608 n.6 (1978). (Moreover, we agree with the court of appeals' holding (Pet. App. 7a-9a) that the case is not properly viewed as one in habeas corpus; the class does not seek immediate release from prison.)

32a-33a), the court of appeals decided "to consider the merits of [respondent's] claim" (*id.* at 33a). The court noted that the Commission has admitted that no weight is given to the length of a prisoner's sentence either in determining the range of customary release dates under the guidelines or in making individual parole determinations (*id.* at 36a).[8] The court concluded that this is impermissible, because the length of sentence was intended to be a relevant factor in the parole process under the Parole Commission and Reorganization Act. Moreover, the court indicated that if the guidelines are applied in a way that excludes consideration of the "individual facts of each case" (Pet. App. 34a, 45a), they would fail to conform to the intent of the Act that each parole determination be based, in part, on the severity of the prisoner's offense (*id.* at 45a).[9]

The court further held that if the guidelines are applied to prisoners sentenced before their effective date, and if they deprive any prisoner "of the possibility of a substantially more lenient punishment" that would have resulted from the previously applicable parole procedures (Pet. App. 58a), then the guidelines, as applied, would violate the Ex Post

[8] Of course, the minimum and maximum sentence lengths established by the sentencing court (18 U.S.C. 4205(b)(1), (2)) determine the period during which the Commission has paroling discretion. See also 18 U.S.C. 4205(a).

[9] The court also suggested that if the Act permits the Commission to disregard sentence length in the parole decision-making process, the statute may unconstitutionally infringe the judicial sentencing function (Pet. App. 46a-50a).

Facto Clause (*id.* at 64a-65a). The court of appeals directed the district court to determine on remand whether the facts reveal that the Commission's guidelines fail to give consideration to sentence length and result in enhanced punishment for prisoners who were sentenced prior to the guidelines' effective date (*id.* at 65a, 66a).

4. After the petition for a writ of certiorari was filed, respondent's counsel filed a motion on November 6, 1978, to substitute or add five additional parties as respondents in this Court, or, in the alternative, to permit the additional parties to intervene as members of the putative class. In granting certiorari, this Court deferred ruling on this motion until the hearing of the case on the merits.[10]

SUMMARY OF ARGUMENT

I

Respondent was released from prison while the case was pending on appeal. The court of appeals recognized that his challenge to the parole guidelines thus became moot. The court also concluded that the

[10] Counsel for respondent filed a similar motion in the district court on November 3, 1978. As we noted in our petition (Pet. 22 n.16), the mandate of the court of appeals was issued to the district court on May 16, 1978. In accordance with the directions of the court of appeals, the district court held a hearing on the class certification issue, but it did not rule on the certification motion or on the motion to add parties plaintiff. On March 15, 1979, following this Court's order granting certiorari, the district court issued an order staying all further proceedings in that court.

district court had correctly declined to certify the class respondent had proposed. The court nonetheless concluded that the case was not moot. The court reasoned that certain subclasses of the proposed class are "certifiable" (even though respondent had not sought their certification) and that if they are certified on remand and if "a factually concrete legal controversy continues to exist, * * * the constitutional *power* of a court over the case remains" (Pet. App. 24a; emphasis in original).

This Court consistently has held, however, that "it is only a 'properly certified' class that may succeed to the adversary position of a named representative whose claim becomes moot." *Kremens* v. *Bartley*, 431 U.S. 119, 132-133 (1977), quoting *Board of School Commissioners* v. *Jacobs*, 420 U.S. 128, 130 (1975). Unless there is a live controversy based on the claim of either a named litigant or a duly certified class, the case lacks the concreteness and adversarial nature that Article III requires. A properly certified class possesses a " 'personal stake in the outcome of the controversy' " and thus satisfies Article III requirements in a case in which the claims of the named litigants have become moot. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 755 (1976). But where the class has not been certified and the claim of the named litigant expires, there is no litigant before the court with a personal stake in the outcome: the case is moot. And the certification of a class thereafter is impermissible, because there is no judicial power to exercise in moot cases.

This is not one of the narrow category of cases where a class may be certified despite the expiration of the named plaintiff's grievance. A certification under these circumstances is appropriate only when the claim is "by nature temporary" and it is unlikely that any individual claim would survive "long enough for a district judge to certify the class." *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975). In such cases the plaintiff can continue the suit whether or not a class is certified. But respondent's legal claims are not transient in nature; they can be adjudicated fully on behalf of a prisoner or a properly certified class of prisoners in another lawsuit.

Respondent's counsel has proposed to cure the jurisdictional defect in this case by moving for the addition or intervention of new parties in this Court. Because the case is moot, however, this Court has no power to grant the motion to intervene. There is no pending case or controversy and thus nothing into which new parties can enter. Intervention cannot breathe new life into an action that is no longer justiciable. New litigants with live claims must file their own actions in a district court.

II

While agreeing with the district court that the proposed class—consisting of all federal prisoners eligible for parole--was too broad, the court of appeals held that the district court abused its discretion under Fed. R. Civ. P. 23(c)(4) by failing, *sua sponte*, to consider the creation and certification of

appropriate subclasses. But Rule 23(c)(4) does not direct the district court to act on its own initiative to construct subclasses when the proposed class is overbroad, and it would be inconsistent with basic principles of adversary litigation to construe the Rule to impose such a requirement.

The class proponent has the burden of establishing the propriety of class action certification, and he does not satisfy this responsibility "by simply affixing the class action label to a suit and depositing it with the clerk." *Satterwhite* v. *City of Greenville*, 578 F.2d 987, 999 (5th Cir. 1978) (en banc). Respondent essentially did no more than that in this case: he did not propose the creation of subclasses in either the district court or the court of appeals. There is no basis for excusing this failure to propose subclass certification by imposing an advocate's duty on the district court instead. Because the district court did not err, it is appropriate to dismiss this case even if this Court accepts the court of appeals' approach to mootness.

III

The court of appeals ruled that the Parole Commission and Reorganization Act requires the Commission, in formulating guidelines for the exercise of paroling discretion and in making parole decisions in individual cases, to give substantial weight to the sentence imposed by the court. Nothing in the language or the history of the Act supports such a requirement.

Section 4206, which establishes the criteria to be considered by the Commission, does not refer to sentence length. The Commission may release a prisoner who is eligible for parole if "upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner * * * release would not depreciate the seriousness of his offense or promote disrespect for the law * * * [or] jeopardize the public welfare." These broad criteria form the basis of the guidelines adopted by the Commission. The guidelines reflect these criteria, and there is no basis for concluding that they are invalid because they do not also automatically give weight to the length of the sentence a particular judge imposed.

The legislative history reveals that Congress was aware of the Commission's use of guidelines based on offense severity and offender characteristics. Congress endorsed the Commission's practice, in order to reduce the effects of sentencing disparity and to achieve a fair and consistent application of parole discretion. Consistency is best achieved by giving weight to the nature and seriousness of the offense under uniform standards, rather than through the perspectives of hundreds of district judges. Remarks made during the debate on the legislation, and numerous references in the Conference Reports, express specific approval for the continued use of the guidelines that the Commission had adopted prior to enactment of the new Act. Moreover, the history of the Act makes clear that the parole decision in individual cases is committed to the discretion of the

Commission and "that the weight assigned to individual factors (in parole decisionmaking) is solely within the province of the (Commission's) broad discretion." S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 28 (1976); H.R. Conf. Rep. No. 94-838, 94th Cong., 2d Sess. 28 (1976).

IV

The court of appeals stated that the guidelines appear to restrict the broad discretion that the Commission previously had exercised in its parole decisions and that, by unduly structuring the parole process, the guidelines deprive prisoners "of the possibility of a substantially more lenient punishment" (Pet. App. 58a). The court reasoned that "the possibility of a substantially more lenient punishment" was a part of each prisoner's sentence prior to promulgation of the guidelines, and that depriving prisoners of this possibility would constitute increased punishment in violation of the Ex Post Facto Clause.

The court's analysis is flawed in two major respects. First, application of the parole guidelines to previously sentenced prisoners does not deprive them of any pre-existing right or impose any additional punishment. The guidelines do not affect the maximum or minimum term of imprisonment that a prisoner may be required to serve. The sentence imposed by the court, in combination with statutory provisions for mandatory release, determines that. Moreover, both before and after adoption of the guidelines, prisoners had no right to release on parole at any particular time; instead, prisoners simply become "eligible" for parole. The Commission had and has discretion to grant or deny release to eligible prisoners. The Commission's guidelines are an exercise, rather than a reduction, of its discretion. They thus are not an ex post facto law.

Moreover, the guidelines do not remove the possibility that a substantially more lenient punishment may result for individual prisoners. By providing broad ranges of customary release dates for various categories of offenders and offenses, the guidelines do not remove the possibility that a parole decision will be made for an earlier (or later) release date whenever the circumstances warrant. 28 C.F.R. 2.20 (b), (c), (d), (e), (g).

ARGUMENT

I

THIS CASE BECAME MOOT WHEN RESPONDENT WAS RELEASED FROM PRISON

A. The Claim Of Respondent Became Moot on June 30, 1977

In every suit invoking the authority of the federal judiciary, "[t]he exercise of judicial power under Art. III of the Constitution depends on the existence of a case or controversy." *Preiser* v. *Newkirk*, 422 U.S. 395, 401 (1975). The absence of judicial authority " 'to review moot cases derives from [this] requirement of Article III * * *.' " *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971), quoting *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 306 n.3 (1964). See also

Powell v. *McCormack*, 395 U.S. 486, 496 n.7 (1969); *United States* v. *Alaska S.S. Co.*, 253 U.S. 113, 116 (1920).[11] To be justiciable, a suit " 'must be definite and concrete, touching the legal relations of parties having adverse legal interests * * *.' " *North Carolina* v. *Rice*, *supra*, 404 U.S. at 246. Courts may not render advisory opinions on abstract question of law, *Hall* v. *Beals*, 396 U.S. 45, 48 (1969), or decide moot controversies "that cannot affect the rights of litigants in the case before them." *North Carolina* v. *Rice*, *supra*, 404 U.S. at 246.

Respondent's challenge to the guidelines of the United States Parole Commission unquestionably became moot on his release from prison at the end of his term of imprisonment.[12] As this Court stated in *Weinstein* v. *Bradford*, 423 U.S. 147, 148 (1975), "it is plain that [a former prisoner] can have no interest whatever in the procedures followed * * * in granting parole." Because respondent "no longer has any interest affected by [the challenged] policy" (*ibid.*), and because "there is no demonstrated probability" that respondent will again be subject to the

[11] See also *Sibron* v. *New York*, 393 U.S. 40, 50 n.8 (1968) (the question of mootness "goes to the very existence of a controversy for us to adjudicate").

[12] In order to satisfy the requirement of Article III, " 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.' " *Preiser* v. *Newkirk*, *supra*, 422 U.S. at 401, quoting *Steffel* v. *Thompson*, 415 U.S. 452, 459 n.10 (1974). See also *County of Los Angeles* v. *Davis*, No. 77-1553 (Mar. 27, 1979), slip op. 6; *Kremens* v. *Bartley*, 431 U.S. 119, 128 (1977).

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challenged parole procedures (423 at 149), his claim is moot.[13] See also *Board of School Commissioners* v. *Jacobs*, 420 U.S. 128, 129 (1975).

B. Because The District Court Had Denied The Request To Certify The Case As A Class Action, The Entire Case Became Moot When Respondent's Claim Became Moot

The court of appeals concluded that, even though respondent's claim became moot before it had rendered a decision, this "does not automatically deprive [the] court of jurisdiction over the cause of action asserted by the class" (Pet. App. 18a). The court emphasized that, if a class "had been properly certified" (*id.* at 19a), the constitutional case or controversy would have survived the mootness of the claim of the class representative. See *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976). Although the court conceded that it had before it "neither a 'live' plaintiff nor a properly certified class" (Pet. App. 21a), it concluded that if

[13] For the same reason, the motion to intervene filed by Eliezer Becher in the district court (see note 6, *supra*) is moot. His release on parole prior to the court of appeals' decision deprived him of any litigable "interest whatever in the procedures followed by petitioners in granting parole." *Weinstein* v. *Bradford*, *supra*, 423 U.S. at 148. Moreover, this case does not involve any challenge to conditions imposed on the grant of parole, or other collateral consequences of parole, that might afford a basis for continuing jurisdiction. See *Scott* v. *Kentucky Parole Board*, 429 U.S. 60, 62 (1976) (Stevens, J., dissenting). Instead, respondent's interest in this case was based only on his concern that the guidelines improperly restricted his ability to obtain parole.

the class was "certifiable" (*id.* at 21a n.43), and if "a factually concrete legal controversy continues to exist, * * * the constitutional *power* of a court over the case remains" (*id.* at 24a; emphasis in original). The court stated that it was appropriate to exercise this power in this case because the questions raised could be " 'capable of repetition, yet evading review' " for some prisoners with short sentences (*id.* at 26a), because respondent's attorneys have "undertaken this litigation on a class-oriented basis [and] [t]here is no indication of any diminution of vigor in their efforts" (*id.* at 27a), and because a contrary holding would "effectively immunize from review such adverse class determinations" (*ibid.*).

The decision of the court of appeals is based on an incorrect interpretation of the decisions of this Court and the principles underlying the mootness doctrine.

1. *A court may not "revive" a moot case*

a. When respondent's claim became moot in 1977 no class had been certified. After the denial of class certification respondent was the only party before the court, and respondent's claim was the entire case. When respondent's claim became moot, the whole case became moot. And when the whole case became moot, judicial power under Article III of the Constitution ended. A court consequently had no power to consider the certification of a class in order to "revive" the action. Even the certification of a class is the exercise of judicial power, and without the

existence of a case or controversy there is no judicial power to exercise. A court has no greater power to certify a class in a case without a plaintiff than it has to certify a class in a case that has never been filed, or a case (brought solely by an attorney) that never had a plaintiff. The fact that the case here was live at one time gives the court no additional power once the case becomes moot. Once respondent's claim became moot, then, the court had no option except to dismiss the action.

This submission is supported by several decisions of this Court. On every occasion that the Court has concluded that the certification of a class action forestalled mootness, it has pointed out that the judicial power to certify the class was exercised while the claim of the representative plaintiff still presented a case or controversy. See *Sosna* v. *Iowa*, 419 U.S. 393, 402 (1975); *Kremens* v. *Bartley*, 431 U.S. 119, 132-133 (1977). As the Court summarized the governing principle, a case becomes moot as soon as the claims of the named litigants become moot "unless [the case] was duly certified as a class action" while the named plaintiffs had a live controversy with the defendants. *Board of School Commissioners* v. *Jacobs*, *supra*, 420 U.S. at 129.

Consistent with "firmly established requirements" under Article III of the Constitution, there must be a "named plaintiff who has * * * a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23 * * *." *Sosna* v. *Iowa*, *supra*,

419 U.S. at 402.[14] Unless there is a live controversy based on the claim of either a named litigant or a "duly certified" class, the case lacks the concreteness and adversarial nature that is requisite to the maintenance of jurisdiction by federal courts. *Ibid.*; see also 419 U.S. at 412 (White, J., dissenting); *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 430 (1976); *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 755 (1976); *O'Shea* v. *Littleton*, 414 U.S. 488, 493 (1974). Where the class has not been certified and the claim of the putative class representative becomes moot, the case is moot because a decision "cannot affect the rights of litigants in the case before [the court]." *North Carolina* v. *Rice*, *supra*, 404 U.S. at 246.[15] And "it is only a 'properly certified' class that may *succeed to* the adversary position of a named representative whose claim becomes moot." *Kremens* v. *Bartley*, *supra*, 431 U.S. at 132-133; emphasis added. Here there is no plaintiff with a live, adversary position to which a class could succeed.[16] Thus, as the Court stated in *Pasa-*

[14] "A litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court." 419 U.S. at 403, citing, *e.g.*, *Bailey* v. *Patterson*, 369 U.S. 31 (1962).

[15] See also *Development in the Law—Class Actions*, 89 Harv. L. Rev. 1318, 1464-1465 n.57 (1976).

[16] Even when a class has been "duly certified," the case becomes moot on the termination of the claims of the named litigants if subsequent developments require any alteration in the definition of the class. *Kremens* v. *Bartley*, *supra*, 431 U.S. at 132. If classes cannot be substantially altered after the claims of the representative become moot, surely they cannot be created from scratch.

dena City Board of Education v. *Spangler*, *supra*, 427 U.S. at 430, a "case would clearly be moot" if the claims of the named litigants are moot and "there has been no certification of any * * * class * * *."

b. The court of appeals reasoned that these decisions "simply point to *certifiability*, not actual certification, as the crucial question" for determining whether the case becomes moot on the expiration of the named litigants' claims (Pet. App. 21a n.43; emphasis in original). But this distinction ignores both the facts and the reasoning of this Court's decisions.

For example, in *Board of School Commissioners* v. *Jacobs*, *supra*, the plaintiffs, seeking to represent a class of school children, filed their suit as a class action. A class of school children surely was "certifiable"; more than that, it was actually certified by the district court. 420 U.S. at 129-130. Both the district court and the court of appeals treated the case as a certified class action. But this Court concluded that the certification was defective for technical reasons. Then, because the class had not been "duly" (*id.* at 129) or "properly" (*id.* at 130) certified, and the claims of the individual plaintiffs had become moot, the Court held that the complaint must be dismissed. The Court did not suggest that the "certifiability" of the class was relevant or that the case could have been revived by recertification in the

district court using proper procedures. It held, to the contrary, that there was no continuing Article III case or controversy and that dismissal was the only open course.

Pasadena also was brought as a class action on behalf of school children. The district court treated the case as a class action from the beginning but never formally certified a class, although certification unquestionably would have been proper (427 U.S. at 430). As in *Jacobs*, by the time the case reached this Court the representative plaintiffs had been graduated from school. As in *Jacobs*, the Court concluded that there was no continuing case or controversy between the private plaintiffs and the defendants.[17] Once more, there was no hint that the case or controversy could be revived by a belated certification of the class.[18]

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[17] In *Pasadena* the Court held that mootness was avoided only by the intervention of the United States as a party plaintiff. 427 U.S. at 430, 431. The United States intervened in the case before the claims of the named individuals became moot. See *Spangler* v. *United States*, 415 F.2d 1242, 1243 (9th Cir. 1969).

[18] In *Weinstein* v. *Bradford*, *supra*, the Court held that the case became moot as soon as the prisoner was released on parole. A class of prisoners would have been "certifiable," but the Court did not suggest that such a class should be constructed. If the scope of Article III jurisdiction turned on whether a class was certifiable, *Weinstein* would not have been moot, because the case was brought as a class action. Certification was denied, and the prisoner did not challenge the denial on appeal. The Court treated the case as if a class allegation had never been made.

Both *Jacobs* and *Pasadena* proceeded in the lower courts as class actions, yet they became moot because the class had not been "duly" certified. Surely there is no reason to conclude—as the court of appeals held here—that mootness would have been avoided in those cases if certification had been denied. It would be bizarre to hold that a case becomes moot (on the expiration of the named plaintiff's claims) if a proper class was certified with defective procedures, but that a case survives if class certification was denied.

In *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 755, the Court emphasized the necessity for "a properly certified class action" to fulfill Article III requirements in a case in which the claims of the named litigants are moot. The Court stated that there must be a party before the court with a "personal stake in the outcome of the controversy" to assure a sharpened and concrete presentation of the issues. *Ibid.*, quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). Where the claim of the putative representative has become moot and class certification has been denied or not yet addressed, there is no cognizable litigant before the court.[19] It is the class members who are cognizable litigants when the class has been certified. *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 756. Where the class has not been certified, however, there are no class members before the court possessing a "personal stake in the out-

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[19] The denial of class action certification "strip[s the case] of its character as a class action." Advisory Committee's Note on the 1966 Amendment to Rule 23, 28 U.S.C. App., page 430.

come." See *id.* at 754 n.6. That is why it is "only a 'properly certified' class that may succeed to the adversary position of a named representative whose claim becomes moot." *Kremens* v. *Bartley, supra*, 431 U.S. at 133, quoting *Board of School Commissioners* v. *Jacobs, supra*, 420 U.S. at 128. As the Ninth Circuit stated in *Vun Cannon* v. *Breed*, 565 F.2d 1096, 1099 (1977), "in the absence of a properly certified class, the representative plaintiff whose claim has become moot is himself without a litigable grievance, and the person or persons on whose behalf he seeks to continue the litigation has or have not yet achieved jurisprudential existence. There being no adversary necessary for the creation of a constitutionally required case or controversy, jurisdiction is lacking." Accord, *Shelton* v. *Pargo, Inc.*, 582 F.2d 1298, 1304 (4th Cir. 1978).[20]

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[20] See also *Inmates* v. *Owens*, 561 F.2d 560 (4th Cir. 1977); *Lasky* v. *Quinlan*, 558 F.2d 1133 (2d Cir. 1977); *Boyd* v. *Justices of Special Term*, 546 F.2d 526 (2d Cir. 1976); *Napier* v. *Gertrude*, 542 F.2d 825 (10th Cir. 1976), cert. denied, 429 U.S. 1049 (1977).

In *Winokur* v. *Bell Federal Savings & Loan Ass'n*, 560 F.2d 271 (1977), cert. denied, 435 U.S. 932 (1978), the Seventh Circuit held that named plaintiffs whose individual claims were moot could not appeal the denial of class certification by the district court. The court held that, because no litigant with a live controversy existed in the case, the court could not exercise jurisdiction "even to reverse the class action determination and thus instill a live controversy into the action." 560 F.2d at 276. In *Susman* v. *Lincoln American Corp.*, 587 F.2d 866 (1978), the Seventh Circuit held that its decision in *Winokur* does not apply where, because of the payment of the named representatives' claims and the dismissal of their action, the district court lacked a "reasonable opportunity to consider and decide" a class certification motion." While the question is not presented here, it is possible that in a situation where the class opponent has undertaken a systematic course of avoiding class litigation by paying the claims of individual litigants promptly on the filing of their federal actions, the *Susman* decision is consistent with *Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

The decision of the Fifth Circuit in *Roper* v. *Consurve, Inc.*, 578 F.2d 1106 (1978), cert. granted, No. 78-904 (Mar. 5, 1979), however, appears inconsistent with *Gerstein*. In *Roper* there was time to rule, and the district court did rule in denying certification. The court of appeals held in *Roper* that payment of the claims of the class representatives following the denial of class certification never makes a case moot. 578 F.2d at 1111.

2. No case in this Court has allowed class certification to "relate back" to overcome mootness when the initial claim would not inherently evade review

In concluding that the "constitutional *power* of a court over the case remains" (Pet. App. 24a; emphasis in original) even though no class has been certified and the claims of the named litigants are moot, the court of appeals relied on *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), and *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977). The court's reliance on those decisions is unwarranted.[21]

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[21] *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976), also does not support the judgment below. In *Baxter* the Court refused to treat the case as a class action where the certification requirement of Rule 23 had not been complied with. The Court held, however, that another prisoner who had intervened as a named plaintiff could raise the claims on his own behalf. 425 U.S. at 310 n.1. Nothing in that case suggests that the intervention occurred after the mooting of the plaintiffs' claims. The action was commenced in November 1970; the last of the original plaintiffs was paroled "two years later"; and the

a. In *Sosna* v. *Iowa*, *supra*, the Court held that a case is not necessarily moot, even though the claims of the named plaintiffs have expired, if the case was certified as a class action before the individual claims became moot. 419 U.S. at 402. The Court also stated in *Sosna* that a case may not be moot even though the class was certified after the named litigants' claims expired if "the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court can reasonably be expected to rule on a certification motion." *Id.* at 402 n.11. Where a claim is "by nature temporary," and it is unlikely that any individual claim would survive "long enough for a district judge to certify the class," *Gerstein* v. *Pugh*, *supra*, 420 U.S. at 110 n.11, the claim may be " 'capable of repetition, yet evading review.' " When the grievance is fleeting, the Court has stated, the class certification may be said to " 'relate back' to the filing of the complaint" for purposes of determining jurisdiction. *Sosna* v. *Iowa*, *supra*, 419 U.S. at 402 n.11.

The "relation back" rule applies only when the claim is so transient that review is otherwise unavailable. Cases "capable of repetition but evading review" survive whether or not a class is certified. See *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911). In such circumstances, because the named plaintiff's claim itself may be adjudicated, it simply makes good sense to allow the class action to

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intervenor entered the case in July 1972. See 425 U.S. at 311 n.1.

go forward. See *Swisher* v. *Brady*, 438 U.S. 204, 213 n.11 (1978) (challenge to judicial review of exceptions to master's proposals in juvenile proceedings); *Gerstein* v. *Pugh*, *supra* (challenge to legality of pretrial detention).[22]

The court of appeals did not hold that this case falls within this narrow exception as a case "so transitory that mootness inevitably intervenes before the District Court can 'reasonably be expected to rule on a certification motion.' " *Boyd* v. *Justices of Special Term*, 546 F.2d 526, 527 n.2 (2d Cir. 1976), quoting *Sosna* v. *Iowa*, *supra*, 419 U.S. at 402 n.11. It could not have done so. Many prisoners serve lengthy terms of confinement. As the experience with collateral attacks on convictions shows, there is often time for numerous challenges to be raised and adjudicated during a single term of imprisonment. Respondent was sentenced in January 1974 and was not released until June 1977. He had ample time to wage campaigns against the parole rules (and against

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[22] See also *Ahrens* v. *Thomas*, 570 F.2d 286, 288-289 (8th Cir. 1978) (same); *Marcera* v. *Chinlund*, 565 F.2d 253 (2d Cir. 1977) (same); *Blankenship* v. *Secretary of HEW*, 587 F.2d 329, 333 (6th Cir. 1978) (right to prompt hearing to contest denial of benefits); *Basel* v. *Knebel*, 551 F.2d 395, 397 n.1 (D.C. Cir. 1977) (challenge to denial of benefits pending hearing on refusal to renew); *Zurak* v. *Regan*, 550 F.2d 86, 91-92 (2d Cir.), cert. denied, 433 U.S. 914 (1977) (procedural rights relating to conditional release of prisoners eligible for such release after 60 days); *Williams* v. *Wohlgemuth*, 540 F.2d 163, 167 (3d Cir. 1976) (eligibility for emergency assistance relief); *McGill* v. *Parsons*, 532 F.2d 484 (5th Cir. 1976) (pretrial detention); *Jones* v. *Diamond*, 519 F.2d 1090, 1097-1098 (5th Cir. 1975) (same).

the convictions as well) before his release, and the district court in fact ruled on both the class certification question and the merits of the case before it became moot.[23]

But the court of appeals concluded that this Court's recognition of an exception to ordinary mootness rules for transitory actions that are "capable of repetition, yet evading review" means that the Court also has rejected the general principle that litigation becomes moot if the class has not been certified before the claims of the individual litigants expire. The court of appeals reasoned (Pet. App. 22a, 24a) that *Gerstein* stands for the proposition that jurisdiction over

[23] The court of appeals suggested that this case "shares many characteristics" with cases that are "capable of repetition, yet evading review" (Pet. App. 26a). But this suggestion is unsupportable. *Weinstein* v. *Bradford, supra,* unequivocally establishes that claims relating to the parole release system are not in this category. There is no basis for concluding here that persons imprisoned in federal penitentiaries are not likely to be in "custody long enough for a district judge to certify the class." *Gerstein* v. *Pugh, supra,* 420 U.S. at 111 n.11. Because only prisoners sentenced to a term exceeding one year are eligible for parole in the federal system (18 U.S.C. 4205(a), (b)), it follows that most, if not all, individual claims concerning the parole guidelines will persist long enough to provide the district court an opportunity to rule on a class certification motion. (Fed. R. Civ. P. 23(c)(1) directs district courts to rule on the certification question "[a]s soon as practicable after the commencement of [the] action.")

In this case, almost a full year elapsed between respondent's second denial of parole and his release from custody. The district court thus had ample time to rule—and it did rule—on respondent's certification request. Moreover, as the court of appeals conceded (Pet. App. 26a), "some prisoners will retain their grievances long enough to achieve appellate review."

the case continues even though the claims of the representatives are moot and no class has been certified, but that courts have discretion to accept or decline jurisdiction in such cases.

The court of appeals' reasoning neglects both the basis of the *Gerstein* rule and the course of this Court's decisions explaining that rule. The adjudication of individual claims that have expired but are "capable of repetition, yet evading review" is based on the "demonstrated probability" (*Weinstein* v. *Bradford, supra,* 423 U.S. at 149) of recurring uncorrected injury. This probability becomes substantial in a case such as *Gerstein* where the "individual could * * * suffer repeated deprivations" if neither he, nor anyone else, could obtain appellate review of the claim. 420 U.S. at 110 n.11. The critical fact in *Gerstein* was not simply that someone may suffer injury again. What was critical in *Gerstein* was that, if the claim is so inherently transitory that even a class certification motion cannot reasonably be decided before the claim expires, there is a "demonstrated probability" that the claim may escape review not only in the first case but in every other case as well. Although the probability that the claim would recur for the individual litigant in *Gerstein* may not have been demonstrably high, the probability that the claim would escape review by that individual should it recur in the future, or by anyone else who might suffer similar injury in the interim, was very high indeed. In this situation, the individual litigant has a " 'personal stake in the outcome' " (*O'Shea* v.

Littleton, 414 U.S. 488, 494 (1974)). That prospect of repeated, uncorrectable injury supplies the constitutional case or controversy. Once the class action is certified in such a case, the interests of the class members support continued jurisdiction over the case.[24] See *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 754-756. *Gerstein* thus states a "narrow" exception to the principle that the class must be certified before the individual claims expire; it does not reverse the rule.[25] 420 U.S. at 110 n.11.

In the present case, however, it is undisputed that respondent's legal claims can be adjudicated fully on behalf of a properly certified class in another lawsuit. There is thus no basis for a conclusion here that a substantial probability of recurring, uncorrectable injury exists, and *Gerstein* does not support respondent.

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[24] This analysis is not inconsistent with the rule that a plaintiff whose claims are moot may not represent the class at certification, see *Bailey* v. *Patterson*, *supra*, 369 U.S. at 32-33. Instead, it recognizes that, in these circumstances, the individual's substantial concern that the potentially recurring conduct would escape review at the behest of himself and all others if a class is not certified provides him with a sufficiently concrete interest to represent the class of persons similarly situated at certification.

[25] If it did, then *Board of School Commissioners* v. *Jacobs*, *supra*—which was decided the same day as *Gerstein*—was in error. The Court held in *Jacobs* that a case became moot on the termination of the named litigants' claims when "inadequate compliance" with the certification procedure of Rule 23 led to the absence of a "duly certified" class.

b. The court of appeals also erred in its reliance on *United Airlines, Inc.* v. *McDonald*, *supra*. That case did not discuss or expressly consider any question of mootness. Rather, the Court held that a post-judgment application for intervention by a putative class member was timely under Fed. R. Civ. P. 24 when it was filed within the period during which the named plaintiffs could have taken an appeal from the denial of class certification.

It is true that the Court stated that, on the facts of *McDonald*, the "refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs * * *." 432 U.S. at 393.[26] But the Court was not concerned with named plaintiffs whose claims had become moot. Although "[t]he settlement of an individual claim typically moots any issues associated with it" (432 U.S. at 400 (Powell, J., dissenting)), the Court did not regard the "settlement" in *McDonald* as having that effect (*id.* at 393 n.14):

> The characterization of the resolution of the * * * action as a "settlement" could be slightly misleading. It is of course true that opposing counsel agreed upon a disposition that resulted in dismissal of the complaints. But that agreement came only after the District Judge had granted motions by some plaintiffs for partial summary judgment, and there was never any question about United's liability in view of [a previous private action that had established liability]. All that remained to be determined

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[26] The Court stated that United Airlines had conceded this much. *Ibid.* But see *id.* at 400 (Powell, J., dissenting).

> was the computation of backpay, and the guiding principles for that computation had been established in [the previous private action]. The "settlement" ultimately reached merely applied those principles to the claims in this case.

The Court apparently concluded in *McDonald* that what had been labeled as a "settlement" was the result of and equivalent to a judgment on the merits in favor of the named plaintiffs. This saved even the individual claims from mootness.[27]

The prevailing party in a case does not lose his personal stake in a controversy merely because he has prevailed. See *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241 (1939). Many collateral issues—such as interest, attorneys' fees, and execution of the judgment—may remain. The prevailing party loses his role as an interested adversary only after he has obtained all the relief he sought and there are no adverse findings with any collateral signifiance. 9 *Moore's Federal Practice* ¶ 203.06, at 716-717 (2d ed. 1975); see *Aetna Casualty and Surety Co.* v. *Cunningham*, 224 F.2d 478 (5th Cir. 1955).

[27] "A payment of a judgment is not necessarily a bar to appeal. When a payment of a judgment is made and accepted under such circumstances as to indicate an intention to finally compromise and settle a disputed claim, an appeal may be foreclosed, but, under such circumstances, it is the mutual manifestation of an intention to bring the litigation to a definite conclusion upon a basis acceptable to all parties which bars a subsequent appeal, not the bare fact of payment of the judgment." *Gadsden* v. *Fripp*, 330 F.2d 545, 548 (4th Cir. (1964) (footnote omitted). See also *Mancusi* v. *Stubbs*, 408 U.S. 204, 206-207 (1972).

If an otherwise-prevailing party has suffered because of an adverse class action determination, he has not obtained all the relief that he sought, and his right to pursue the appeal may be justified on this basis, as the Court apparently assumed in *McDonald*.[28]

3. *The public's interest in the resolution of a legal dispute does not supply the requisite case or controversy*

The court of appeals erred in suggesting (Pet. App. 26a-27a) that several "discretionary elements" could support an exercise of jurisdiction in this case. As the Court stated in *Richardson* v. *Ramirez*, 418 U.S. 24, 36 (1974), "purely practical considerations have never been thought to be controlling by themselves on the issue of mootness in this Court." For example, although a state court is not subject to Article III and may choose to adjudicate a moot controversy "because of its public importance," the federal courts are "limited by the case-or-controversy

[28] In *Share* v. *Air Properties G. Inc.*, 528 F.2d 279, 283 (9th Cir. 1976), cited by the Court in *McDonald* (432 U.S. at 393 n.14) for the proposition that a prevailing plaintiff may appeal the denial of class action certification, the court of appeals explained the appellants' personal stake in the controversy as follows:

> It is simply not true * * * that the successful plaintiff in an individual [damages] action would have no incentive to challenge a denial of class status. Presumably, a reversal of the denial would lead to a greater recovery and hence lower the proportion of plaintiff's individual recovery going to his attorney.

See also *Galvan* v. *Levine*, 490 F.2d 1255 (2d Cir. 1973).

requirement of Art. III to adjudication of actual disputes between adverse parties." *Ibid.* The court of appeals' reference to the fact that "numerous federal prisoners" are concerned with the resolution of the legal issues presented in this litigation (Pet. App. 26a) is thus not relevant to the question of justiciability in this case.[29] If the importance of a question were enough to call for its prompt resolution, there would be no bar to the issuance of purely advisory opinions.

The fact that respondent, or at least respondent's attorneys, have indicated no "diminution of vigor in their efforts" (Pet. App. 27a) is similarly irrelevant. See *Richardson* v. *Ramirez*, *supra*, 418 U.S. at 36; *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). The vigor of the attorneys' representation "cannot alter the fact" that respondent's case is moot. *Ibid.* Indeed, if an attorney's vigor sufficed to create a case or controversy, there would be no need for plaintiffs, and the Article III bar on the resolution of "hypothetical or abstract" controversies would be meaning-

[29] The court of appeals' suggestion (Pet. App. 27a) that the restrictions on interlocutory appeals from class certification denials (see *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978) and *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978)) support a finding of jurisdiction in this case is insubstantial. The rules of appellate jurisdiction cannot expand the scope of Article III cases or controversies. At all events, Congress has ample power (if it thinks that the unavailability of interlocutory appeals is detrimental to plaintiffs) to amend 28 U.S.C. 1292 to provide jurisdiction in the courts of appeals for the review of class action determinations.

less. See *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227, 240 (1937).

C. The Proposed Intervention Of Additional Parties In This Court Cannot Create Jurisdiction In This Case

Respondent's counsel has filed a motion for five persons to intervene in this Court. If this case were not already moot, we would not oppose the substitution or intervention of any of the proposed intervenors who otherwise would be proper parties.[30] Because the case is moot, however, this Court has no power to grant the motion to intervene. In the absence of a pending case or controversy, there is nothing into

[30] Only James Taylor appears to possess claims of the type initially presented by respondent. Harry Cardillo is scheduled for mandatory release on July 2, 1979, and thus his claims will become moot before this Court rules on the intervention motion. James Rust was released from prison on April 23, 1979; his claims, like those of respondent, are therefore moot. For different reasons, Millard V. Hubbard and David Gillis are also not proper parties to this suit.

According to information contained in respondent's motion in the district court (see note 10, *supra*), Hubbard was sentenced by a federal district judge in the Northern District of Illinois in September 1972 to 10 years' imprisonment. But Hubbard is not yet serving his federal sentence. Instead, he is serving a state sentence previously imposed by an Illinois court. He is thus not currently subject to the federal parole authority, and it does not appear that he soon will be. His challenge to the operation of the federal parole system therefore lacks ripeness.

Gillis is incarcerated at a federal correctional institution in North Carolina. Since this case has never been certified as a nationwide class action (or even as a local class action), the addition of Gillis to this action would create unnecessary practical problems. See *Starnes* v. *McGuire*, 512 F.2d 918, 929-931 (D.C. Cir. 1974) (en banc).

which new parties can enter. Persons with live claims must file their own actions.[31]

A motion to intervene is ancillary to the principal case. A court has authority under Fed. R. Civ. P. 24 to grant a motion to intervene "in an action" only when it has jurisdiction over the "action" itself. *Hofheimer* v. *McIntee*, 179 F.2d 789, 792 (7th Cir.), cert. denied, 340 U.S. 817 (1950):

> An existing suit within the court's jurisdiction is a prerequisite of an intervention, which is an ancillary proceeding in an already instituted suit. * * * [If the main action has] been rightfully necessarily dismissed, * * * there [is] nothing left in which the movant could intervene.

See also *Black* v. *Central Motor Lines, Inc.*, 500 F.2d 407 (4th Cir. 1974); *Glover* v. *Coffing*, 177 F.2d 234 (7th Cir. 1949), cert. denied, 339 U.S. 904 (1950). It has thus consistently been held that, if the "action" has become moot before the motion to intervene is acted upon, the court had no jurisdiction to grant the motion. "[I]ntervention may not be allowed to give life to a law suit which does not actually exist * * * [or] breathe new life into an action which [is] no longer justiciable * * *."[32] *Becton* v. *Greene County Board of Education*, 32 F.R.D. 220, 223 (E.D. N.C. 1963). See also *Schmoll Fils, Inc.* v. *The Fernglen*, 85 F. Supp. 578 (S.D. N.Y. 1949); *Levenson* v. *Little*, 75 F. Supp. 575 (S.D. N.Y. 1948). Because this case became moot while it was pending in the court of appeals, the motion to intervene should be denied. The case should be dismissed outright. *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950).

[31] The fact that intervention was sought by another prisoner before respondent's claim became moot does not affect this analysis (see notes 6, 13, *supra*). That application for intervention was denied by the district court; it became moot prior to the decision of the court of appeals.

[32] *Rogers* v. *Paul*, 382 U.S. 198 (1965), is consistent with these decisions. The Court allowed intervention in *Rogers* of new parties where the motion was filed before the claims of the original plaintiffs became moot. The motion may not have been granted until after the original plaintiffs' claims became moot, but jurisdiction nonetheless continued in the case because it had been previously certified as a class action. *Id.* at 199. See *Franks* v. *Bowman Transportation Co., supra*. By contrast, the motions to intervene in this Court were filed more than 16 months after respondent's claim became moot, and the case has not been certified as a class action.

II

THE DISTRICT COURT DID NOT ERR IN NOT CONSTRUCTING AND CERTIFYING SUBCLASSES THAT RESPONDENT NEVER SUGGESTED

The court of appeals' conclusion that this case is not moot rests on its conclusion that a class action was "certifiable." We have argued above that the "certifiability" of a class is irrelevant if the case becomes moot before a class has been certified properly. Even if the Court disagrees with this argument, however, it does not follow that a class should be certified here in order to rescue the case from mootness. Certification is improper for two reasons. First, the class action proposed by respondent was

not "certifiable." Second, even if the construction of subclasses sometimes is a way to create a "certifiable" class, a district court has no obligation to construct and certify subclasses *sua sponte*. Consequently, the district court properly denied class certification in this case. Because the denial of certification was proper, there is no support for the court of appeals' remand for further proceedings.

Respondent sought the certification of a class of all persons now or in the future eligible for parole. As the court of appeals concluded (Pet. App. 29a), certification of such a class would have been improper. The class would have contained persons with antagonistic interests. Some prisoners may be aggrieved by the guidelines, but other prisoners may find that the guidelines reduce the length of time they may be expected to serve. And respondent, who was sentenced after the promulgation of the guidelines and resentenced specifically to take the guidelines into account, could not represent persons sentenced before (or in ignorance of) the promulgation of the guidelines. A class cannot be certified when the interests are antagonistic, or when some portions of the class have interests not adequately represented by the named plaintiff. See *East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977); *Kremens* v. *Bartley, supra*. These principles are undisputed by respondent. It must follow that there was no "certifiable" class in the case, or at least none proposed by respondent. Under the court of appeals'

approach to jurisdiction, then, the case would be moot unless the district court had an obligation to identify some certifiable subclass.

A district court has authority under Fed. R. Civ. P. 23(c)(4) to alleviate difficulties encountered or anticipated in the management of a class action by dividing the class into appropriate subclasses. The creation of such subclasses, as well as the determination whether any class should be certified, rests in the discretion of the trial court. *Rex* v. *Owens*, 585 F.2d 432, 436 (10th Cir. 1978); *Monarch Asphalt Sales Co.* v. *Wilshire Oil Co.*, 511 F.2d 1073, 1077 (10th Cir. 1975). No court had held, prior to the decision of the court of appeals in this case, that the district court must identify and construct subclasses even though the plaintiff has not requested it to do so.[33]

As a general principle, it is the plaintiff's burden to establish the propriety of certifying the class he

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[33] The court of appeals' reliance (Pet. App. 30a-31a) on *Samuel* v. *University of Pittsburgh*, 538 F.2d 991 (3d Cir. 1976), is unwarranted. *Samuel* held that the district Court erred in concluding that a class action was unmanageable and that the district court's decertification of the class was therefore improper. The court added, in dicta, that even if the class action were unmanageable the court should have considered "the possible usefulness of subclasses" to avoid management problems. 538 F.2d at 996. The decision does little more than point out the potential benefits of using subclasses to alleviate management difficulties; it did not place on the district court an obligation to create subclasses for the benefit of plaintiffs who have not sought subclass certification.

has identified in his request for class action certification.[34] If the proposed class is overbroad or otherwise inappropriate, the plaintiff must retain the responsibility of demonstrating the suitability of proceeding with subclasses. "Counsel for class have primary responsibility for pressing [a] class action claim, and they do not satisfy their responsibilities by simply affixing [the] class action label to [a] suit and depositing it with [the] clerk." *Satterwhite* v. *City of Greenville*, 578 F.2d 987, 999 (5th Cir. 1978) (en banc).[35]

But respondent essentially did no more in this case. Respondent never suggested to the district court that it consider the possibility of subclass certification, even after petitioners, in opposing the motion to certify, contended that the proposed class was overly broad (Br. in Opp. to Pet. for Habeas Corpus (filed Dec. 13, 1976) at 5-6). After the district court denied certification, respondent did not move for re-

[34] See, *e.g.*, *Rex* v. *Owens, supra*, 585 F.2d at 435; *Smith* v. *Merchants & Farmers Bank of West Helena*, 574 F.2d 982, 983 (8th Cir. 1978); *Windham* v. *American Brands, Inc.*, 565 F.2d 59, 64 n.6 (4th Cir. 1977) (en banc), cert. denied, 435 U.S. 968 (1978); *Doctor* v. *Seaboard Coast Line R.R.*, 540 F.2d 699, 706 (4th Cir. 1976); *Davis* v. *Romney*, 490 F.2d 1360 (3d Cir. 1974). See also 3B *Moore's Federal Practice*, ¶ 23.02-2, at 23-96 (2d ed. 1977); 7A C. Wright & A. Miller, *Federal Practice and Procedure*, § 1798, at 244-245 (1972).

[35] See also *Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340, 354-359 (1978), and *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974) which establish that the plaintiffs (not the defendants or the court) have the principal responsibility for proposing, managing and bearing the costs of class litigation.

consideration or propose that subclasses be created. Indeed, even in his brief in the court of appeals respondent did not argue that subclass certification should have been considered. He argued instead that the proposed class was not overbroad (Appellant's Brief at 23-25), a contention that the court of appeals correctly rejected (Pet. App. 29a). In this situation, there is no basis to excuse respondent's failure to propose subclass certification and to impose that duty on the district court instead.

Rule 23(c)(4) does not direct the district court to act on its own initiative to construct subclasses when the proposed class is overbroad.[36] It is inconsistent with basic principles of adversary litigation to construe the Rule to impose such an obligation on the trial court when the plaintiff has failed to suggest such an alternative.[37] Placing the burden on the court rather than on counsel to propose subclass certification also is contrary to the accepted principle that grounds for reversal may not ordinarily be urged on appeal that were available, but not raised, in the district court. See, *e.g.*, *Dothard* v. *Rawlinson*,

[36] Rule 23 differs in this regard from Rule 21, which provides that the court may add or drop parties "of its own initiative at any stage of the action * * *." Although the court is thus expressly authorized to act *supra sponte* under Rule 21, major alterations in the structure of the litigation are ordinarily left for the parties to propose. See *Bass* v. *Harbor Light Marina, Inc.*, 372 F. Supp. 786, 793 (D. S.C. 1974).

[37] Cf. *Wilson* v. *Zarhadnick*, 534 F.2d 55, 57 (5th Cir. 1976): "The grant, *sua sponte*, of class action relief when it is neither requested nor specified, is an obvious error."

433 U.S. 321, 323 n.1 (1977). Thus, in a similar context, the court held in *Delums* v. *Powell*, 566 F.2d 167, 190-191 (D.C. Cir. 1977), cert. denied, No. 77-955 (July 3, 1978), that a motion to decertify a class does not "put anyone on notice" that subclass certification was desired as an alternative, and that, since "no objections were raised to the absence of a subclass" at trial, the issue was not preserved for the appeal.[38]

The approach of the court of appeals here would create unmanageable difficulties for district courts. It would require trial courts to apply their limited resources in an effort to construct class certification theories that even plaintiff's counsel, possessing an adversarial interest in the litigation, has not imagined or thought worth raising. By placing this novel burden of advocacy on the district court, the decision releases counsel from their ordinary and appropriate responsibility. It exposes the court to reversal and a renewal of proceedings with regard to matters that were not contested before it and thus discourages the efficient use of judicial resources by class action litigants.

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[38] Nothing suggests that an order remanding for consideration of subclass certification is necessary to correct manifest injustice, see *Hormel* v. *Helvering*, 312 U.S. 552, 556-557 (1941), in a case where the plaintiff did not request subclass certification in the district court or the court of appeals. If the case is dismissed by the court of appeals and other members of the proposed subclass in fact desire to litigate similar claims, they may initiate a new lawsuit in the district court.

Moreover, the court of appeals entertained the unrealistic assumption that the district courts' construction of unproposed subclasses would be beneficial to class members. "[W]hen a [challenged] action is one that may be characterized as injurious by only part of the affected group," it is frequently preferable simply to deny certification, for the named plaintiffs may not represent the entire variety of the affected interests. *Phillips* v. *Klassen*, 502 F.2d 362, 366-368 (D.C. Cir.), cert. denied, 419 U.S. 996 (1974). Then plaintiffs whose claims are more typical of the alleged injuries may begin a separate action. Because every subclass must be represented by a plaintiff at the time of its certification, certification of subclasses with divergent interests often will be impossible with only the original plaintiffs before the court.[39] As was stated in *Richardson* v. *Ramirez*, *supra*, 418 U.S. at 39, a plaintiff "may not represent a class of which he is not a part." Nor may he represent a subclass of which he is not a part. *Abercrombie* v. *Lums, Inc.*, 345 F. Supp. 387 (S.D. Fla. 1972). Thus, when an action is brought by only one representative plaintiff and it is determined that the interests of the proposed class fall into opposing

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[39] The court of appeals suggested that *amici curiae* might be appointed "to represent divergent interests of subclasses" (Pet. App. 32a n.66). This may be true. But it does not explain how the district court can certify the subclass in the first place if there is no subclass representative before the court. In order to certify the subclasses under Rule 23, there must be "representative parties," and not simply *amici curiae*, to protect the interests of each subclass.

camps, an inquiry into subclass certification often would not be fruitful, even if it had been requested.

The facts of this case illustrate the complexity of the task the court of appeals has required district courts to undertake. As the court of appeals recognized (Pet. App. 30a-32a), prisoners serving either "short" or "long" sentences for the same offense may have divergent interests in challenging the guidelines. The interests of prisoners within each of these two classes may diverge again depending on the category of their various offenses.[40] Moreover, because parole decisions are made outside the guidelines in some circumstances, *e.g.*, 28 C.F.R. 2.20(c) and (d), the differing personal situations of individual prisoners may result in a further and unpredictable divergence of class alignments. There will be still further divergence depending on whether the district judge took the guidelines into account when sentencing a particular prisoner. It is all but impossible to determine whether and to what extent any individual prisoner would have fared differently if the guidelines had not been adopted (see pages 87-88 & n.77, *infra*). Accordingly, even if respondent had proposed the creation of subclasses in this case, it is by no means evident that denial of certification would have been an abuse of discretion. Indeed, because respondent could not have represented the interests of many of the possible subclasses, the district court could not have certified those subclasses at the time class cer-

[40] Respondent's complaint alleged that his offense was rated too severely under the guidelines (Pet. App. 29a).

tification was proposed. Consequently, class certification was properly denied, and the case is moot even if the court of appeals' "certifiability" theory is accepted.

III

THE PAROLE COMMISSION AND REORGANIZATION ACT DOES NOT REQUIRE THE PAROLE COMMISSION TO CONSIDER THE LENGTH OF A PRISONER'S SENTENCE IN MAKING PAROLE RELEASE DETERMINATIONS

The court of appeals ruled that the Parole Commission and Reorganization Act requires that the Commission's guidelines for the exercise of paroling discretion, and its decisions in each case, take into account the sentence imposed by the court (Pet. App. 45a). For the reasons stated above, the court of appeals lacked jurisdiction to consider the merits. But even if the court had jurisdiction, it erred in reaching this conclusion about the statute. As we show below, Congress anticipated that the Commission would continue its effort to achieve consistency and rationality in the parole process by the use of guidelines that give no weight to sentence length. Moreover, Congress intended that the weight to be assigned to any factor is to remain "solely within the province of the (Commission's) broad discretion." H.R. Conf. Rep. No. 94-838, 94th Cong., 2d Sess. 28 (1976). The Act thus does not require the Commission to consider sentence length either in the promul-

gation of guidelines or in the exercise of its discretion in individual parole determinations.[41]

A. The Purpose Of The Parole Guidelines Is To Achieve Consistency And Rationality In The Exercise Of The Commission's Broad Discretion Over Parole Determinations

The sentence imposed defines the period during which a prisoner is eligible for parole. Although a district judge has numerous options available at sentencing,[42] the three options most commonly used are specified in 18 U.S.C. 4205(a) and (b).[43] If a

[41] The court of appeals did not squarely hold that the present parole system is invalid. Rather, it directed the district court to determine on remand whether the evidence supports the conclusion that the Commission gives no weight to sentence length in its parole determination process (Pet. App. 36a). The Commission admits, however, that no weight is given under the guidelines to the length of the judicial sentence, and it has acknowledged this in both courts below (*ibid.*). Thus, if the court of appeals had jurisdiction to issue pronouncements on the merits, its opinion effectively determines the issue of the validity of the Commission's parole procedures, and the hearing on remand would be a mere formality.

[42] A number of these options depend on the mental condition, age, or drug addiction of the convicted offender. *E.g.*, 18 U.S.C. 4205(c) (commitment for psychological study), 18 U.S.C. 4216 (offenders 22 to 25 years old at the time of conviction), 18 U.S.C. 4251-4255 (narcotic addicts), 18 U.S.C. 5005-5026 (offender less than 22 years old at the time of conviction), 18 U.S.C. 5031-5042 (juvenile delinquents).

[43] The provisions of Section 4205 are a recodification of 18 U.S.C. (1970 ed.) 4202 and 4208 accomplished by the Parole Commission and Reorganization Act, Pub. L. No. 94-233, 90 Stat. 219-231. Former Sections 4202, 4208(a)(1), and 4208

prisoner is sentenced under 18 U.S.C. 4205(a) to a term of imprisonment in excess of one year, he becomes eligible for parole after serving one-third of the maximum sentence imposed.[44] The court may sentence the offender under 18 U.S.C. 4205(b)(1) and designate a minimum term of imprisonment that establishes parole eligibility at any point between the beginning of the sentence and one-third of the maximum. Or the court may impose sentence under 18 U.S.C. 4205(b)(2), in which event the prisoner is eligible for parole "at such time as the Commission may determine." The sentence thus imposed—in conjunction with the statutory provision requiring discharge on the expiration of the term of imprisonment "less the time deducted for good conduct [under 18 U.S.C. 4161]," 18 U.S.C. 4163[45]—establishes the minimum and maximum period of confinement.

During the period between the prisoner's first eligibility for parole and his mandatory discharge, the Commission has substantial discretion in deciding

(a)(2) are recodified at 18 U.S.C. 4205(a), 4205(b)(1) and 4205(b)(2). The Act also renamed the Board of Parole as the Parole Commission.

[44] If the sentence is for more than 30 years, the prisoner becomes eligible for parole under 18 U.S.C. 4205(a) after serving 10 years.

[45] "Good time" credits can accumulate to as much as one-third of the sentence, but more commonly they amount to approximately one-quarter of the sentence. Prisoners discharged on the basis of good time credits under 18 U.S.C. 4163 are released "as if on parole" and come under the supervision of the Commission until the sentence expires. 18 U.S.C. 4164.

whether to grant parole.[46] Under 18 U.S.C. (1970 ed.) 4203(a), which was in effect when respondent was sentenced, the Commission was entitled to consider the risk of recidivism and any other aspect of the public welfare in making its decision.[47] Under the present statute, enacted in 1976, the Commission must consider whether, in view "of the nature and circumstances of the offense and the history and characteristics of the prisoner, * * * release would * * * depreciate the seriousness of [the] offense or promote disrespect for the law." 18 U.S.C. 4206(a)(1).

[46] Since 1976 this discretion has been slightly altered in one regard. Under 18 U.S.C. 4206(d), a prisoner sentenced to a term of five years or longer is presumptively entitled to release on parole after he has served two-thirds of his sentence (or 30 years of any sentence in excess of 45 years). Parole may be withheld thereafter only on a finding by the Commission that the prisoner has "seriously or frequently violated institution rules and regulations or that there is a reasonable probability that he will commit any Federal, State, or local crime." *Ibid.*

This provision has no direct relevance to the Commission's practice under the guidelines because, to the extent it applies, it simply displaces the guidelines. 28 C.F.R. 2.53. The provision has some relevance, however, in understanding Congress's intent in enacting the other provisions of the Parole Commission and Reorganization Act. See pages 63-64 & note 58, *infra*.

[47] 18 U.S.C. (1970 ed.) 4203 provided:

> If it appears to the Board of Parole * * * that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole.

See also note 46, *supra*. These standards give the Commission ample if not unlimited discretion; courts have recognized that under both the new and the old statute the Commission's paroling discretion is essentially absolute. *E.g., Rifai* v. *United States Parole Commission*, 586 F.2d 695 (9th Cir. 1978); *Brest* v. *Ciccone*, 371 F.2d 981 (8th Cir. 1967).

Until 1970 the Commission exercised its discretion case by case, using few published criteria. In response to widespread criticism that this led to arbitrary and erratic decisions,[48] the Commission, in cooperation

[48] Both the federal and state parole boards had been criticized severely for the failure to adopt formal standards for parole decision making. A report of the National Advisory Commission on Criminal Justice Standards and Goals summarized this shortcoming as follows:

> The absence of written criteria by which decisions are made constitutes a major failing in virtually every parole jurisdiction. Some agencies issue statements purporting to be criteria, but they usually are so general as to be meaningless. The sound use of discretion and ultimate accountability rest largely in making visible the criteria used in forming judgments. Parole Boards must free themselves from total concern with case-by-case decision making and attend to articulation of the actual policies that govern the decision making process.

National Advisory Commission on Criminal Justice Standards and Goals, *Task Force Report: Corrections* 418 (1973). See also N. Morris, *The Future of Imprisonment* 24-43 (1974); D. Stanley, *Prisoners Among Us: The Problem of Parole* 50-66 (1976); A. von Hirsch & K. Hanrahan, *Abolish Parole?* 7-14 (1978).

The federal Parole Board in particular was sharply criticized for its failure to articulate an explicit paroling policy:

> An outstanding example of completely unstructured discretionary power that can and should be at least par-

with the Research Centers of the National Council on Crime and Delinquency, undertook an analysis of its previous decisions in order to identify the policies and release criteria implicit in those decisions. These studies showed that in making parole decisions the primary concerns were severity of offense, parole prognosis, and institutional behavior, and that a fairly accurate prediction of the Commission's parole release decisions could be made by knowledge of the Commission's evaluations of these three factors.[49]

As a result of these studies, the Commission began to experiment with structured release criteria that took into account the factors that figured most prominently in the Commission's past decisions—the nature of the offense and the offender's personal character-

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tially structured is that of the United States Parole Board. In granting or denying parole, the board makes no attempt to structure its discretionary power through rules, policy statements, or guidelines; it does not structure through statements of findings and reasons; it has no system of precedents * * *.

K.C. Davis, *Discretionary Justice* 126 (1969). A similar suggestion for the adoption of paroling guidelines was made by the Administrative Conference of the United States. See *Administrative Conference Recommendation 72-3: Procedures of the United States Board of Parole (adopted June 9, 1972)*, 2 *Recommendations and Reports of the Administrative Conference of the United States* 58-62 (1973).

[49] See Gottfredson, Hoffman, Sigler & Wilkins, *Making Paroling Policy Explicit*, 21 Crime and Delinquency 34, 37 (1975). See also the data discussed in Morris, *supra*, and Stanley, *supra*.

istics.[50] It ranked offenses by severity and assigned weights to offender characteristics according to their statistical value as predictors of recidivism. For each combination of offense severity and risk of recidivism, the prisoner and the Parole Commission could find in a table a range (*e.g.*, 36 to 45 months) that approximately 80% to 85% of the persons with similar char-

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[50] Respondent contends (Br. in Opp. at 14-15) that these studies did not give any role to the length of sentence imposed by the court because the studies were based on observations of the Commission's release decisions in cases involving persons sentenced under the Federal Youth Corrections Act, 18 U.S.C. 5010.

The studies focused on Federal Youth Corrections Act sentences because that statute left the Commission almost entirely free to make decisions, unfettered by minimum sentences or varying mandatory release dates. See Hoffman, *Paroling Policy Feedback* 10 (NCCD Supp. Rep. No. 8, 1973). Youth cases therefore were ideal for research to determine what factors the Commission was taking into account. Regular adult cases might mask the factors: if there was a minimum time of service before parole eligibility, the Commission would be forbidden to release a prisoner who might be released under the Commission's independent analysis. Similarly, a disparity in maximum terms might have required the Commission to release a prisoner on good time credits under 18 U.S.C. 4163 who would be retained in prison if the Commission's weighing of factors prevailed. The indeterminate nature and uniform length of the Federal Youth Corrections Act sentences made it possible to isolate the criteria the Commission in fact employed in its parole decisions.

In any event, the question at issue here does not turn on the origins of the guidelines, but on whether their failure to consider sentence length contravenes the intent of Congress in enacting the Parole Commission and Reorganization Act.

acteristics could expect to serve, with good institutional behavior, before release.[51]

The research was commenced in 1970, before respondent was sentenced. The use of guidelines based on the study results was initiated on a trial basis in one region in 1972 and was significantly revised and extended throughout the nation in November 1973 (38 Fed. Reg. 31942).[52] The present guidelines are codified at 28 C.F.R. 2.20. The objective of the guidelines is to "promote a more consistent exercise of discretion, and enable fairer and more equitable decision-making without removing individual case consideration * * *" (28 C.F.R. 2.20(a)). See also *United States* v. *DiRusso*, 535 F.2d 673, 674 (1st Cir. 1976). Consistent with this objective, the guidelines are not inflexible. For each of six categories of offense severity, subdivided into four categories of offender characteristics, the guidelines indicate the broad, customary range of confinement to be served by persons with good institutional behavior.[53] 28

[51] For a history of this development and a more detailed description of the system, see Stanley, *supra*; Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 Yale L.J. 810 (1975); Hoffman & DeGostin, *Parole Decision-Making: Structuring Discretion*, 38 Federal Probation 7-15 (December 1974).

[52] The 1972 experiment in the Commission's northeast region (which includes Pennsylvania, where respondent was incarcerated) involved a table of factors for the computation of guideline release ranges similar to those in use today.

[53] See Hoffman & DeGostin, *supra*, 38 Federal Probation at 9: "By providing a specific policy range and requiring a written explanation for each decision outside this range, the guidelines endeavor to structure discretion without removing it, and thus permit more rational and consistent decisionmaking.

C.F.R. 2.20(b). The guidelines do not establish customary ranges of confinement for every conceivable offense; instead they provide several examples of offenses within each severity level. 28 C.F.R. 2.20(d). See *Garcia* v. *United States Board of Parole*, 557 F.2d 100, 106 & n.6 (7th Cir. 1977); Hoffman & DeGostin, *Parole Decision-Making: Structuring Discretion*, *supra*, 38 Federal Probation at 9. Mitigating or aggravating circumstances relating to a particular offense, as well as institutional performance, may justify a decision outside the guidelines' ranges.[54] 28 C.F.R. 2.20(c), (d), (e). The Commission has reserved discretion to depart from the guidelines whenever it concludes that the circumstances so warrant. 28 C.F.R. 2.18, 2.20(c). Moreover, the Commission has retained authority to revise or

[54] 18 U.S.C. 4206(c) allows the Commission to grant or deny release on parole notwithstanding the guidelines if it determines there are good reasons for doing so, provided the Commission gives the prisoner written notification stating the reasons and information relied on. Factors suggested by Congress as justifying a parole release determination above the guidelines were "whether or not the prisoner was involved in an offense with an unusual degree of sophistication or planning, or has a lengthy [prison] record, or was part of a large scale conspiracy or continuing criminal enterprise." On the other hand, a decision below the guidelines might be justified by such factors as "a prisoner's adverse family or health situation." S. Conf. Rep. No. 94-648, *supra*, at 27; H.R. Conf. Rep. No. 94-838, *supra*, at 27.

modify the guidelines when appropriate.[55] 28 C.F.R. 2.20(g).

B. The Parole Commission and Reorganization Act Endorsed The Commission's Use Of The Parole Guidelines And Did Not Require The Commission To Consider Sentence Length In Making Discretionary Parole Decisions

In enacting the Parole Commission and Reorganization Act in 1976, Congress did not repudiate the Commission's choice to exercise its discretion pursuant to parole guidelines. To the contrary, the Act expressly directs the Commission to promulgate guidelines for the exercise of its power to grant or deny parole. 18 U.S.C. 4203(a)(1), (b). Moreover, in stating the criteria the Commission is to consider in making parole release determinations, the Act provides that such determinations are to be made "pursuant to guidelines promulgated by the Commission * * *." 18 U.S.C. 4206(a). The Act also provides that "[t]he Commission may grant or deny release on parole notwithstanding the guidelines * * * [only] if it determines there is good cause for so doing * * *." 18 U.S.C. 4206(c); see S. Conf. Rep. No. 94-648, *supra*, at 27.

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[55] See also 18 U.S.C. 4203(a)(1). The Commission has recognized that the use of guidelines might create an unnecessarily rigid system to replace the unnecessarily chaotic one that preceded it. The Commission therefore has reserved the right to depart from its guidelines in particular cases and to reexamine the guidelines periodically. See 28 C.F.R. 2.20(g); Gottfredson, Hoffman, Sigler & Wilkins, *supra*, 21 Crime and Delinquency at 41; S. Conf. Rep. No. 94-648, *supra*, at 27; H.R. Conf. Rep. No. 94-838, *supra*, at 27.

Congress thus required the Commission to employ guidelines in the exercise of its discretionary parole authority. The question in this case is not whether the adoption and use of parole guidelines is appropriate under the Act; instead it is whether, in providing for the use of such guidelines, Congress required the Commission to consider sentence length as a factor either in the establishment of the guidelines or in the application of discretion to depart from the guidelines for "good cause." As we will show, neither the language nor the history of the Act indicates that Congress intended either requirement.

1. Congress intended the Commission to reduce rather than to perpetuate the effects of sentence disparity

a. Nothing in the Act requires the Commission to consider sentence length in any way. Section 4206, which establishes the criteria to be applied by the Commission in making discretionary parole decisions, does not refer to sentence length. This Section provides, in quite general terms, that the Commission may release a prisoner who is eligible for parole if "upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner * * * release would not depreciate the seriousness of his offense or promote disrespect for the law * * * [or] jeopardize the public welfare." 18 U.S.C. 4206(a).

These broad criteria form the basis of the guideline system. For example, the requirement that the "nature and circumstances of the offense" be considered in parole decisions is reflected in the guide-

lines through (1) the separate rating of offense severity for different categories of offenses and (2) the specialized rating of offense severity for individual offenses when "mitigating or aggravating circumstances" are present.[56] 28 C.F.R. 2.20(d). The requirement that the "history and characteristics of the prisoner" be considered is reflected in the guidelines by (1) the rating of prisoners into several parole prognosis categories on the basis of their personal histories and (2) the retained discretion to depart from those ratings in individual cases "where circumstances warrant." 28 C.F.R. 2.20(e). Finally, the requirement that the Commission consider whether "release would * * * depreciate the seriousness of his offense or promote disrespect for the law * * * [or] jeopardize the public welfare" is reflected in the broad ranges of customary release dates established in the guidelines for particular offense categories and the Commission's retained discretion to select an appropriate release date outside the guideline

[56] Respondent contended in the court of appeals (Pet. App. 37a) that Section 4206(a) requires the Commission to consider the "nature and circumstances of the offense and the history and characteristics of the prisoner" on an "individualized" basis. This argument is inconsistent with the requirement of the statute that parole determinations be made "pursuant to guidelines" unless there is "good cause" for departing from the guidelines. 18 U.S.C. 4206(a), (c). In any event, the guidelines do permit "individualized" consideration of these factors in all cases where the circumstances warrant. See 28 C.F.R. 2.20(d), (e). The record reflects that such an individualized determination was made in this case (A. 6; Pet. App. 5a).

ranges for "good cause." 28 C.F.R. 2.20(c). Since the guidelines properly reflect the parole criteria established in Section 4206, there is no basis for concluding that they are invalid because they do not also provide for consideration of sentence length in parole decisionmaking.

b. The legislative history of the Act indicates that Congress was aware of the Commission's use of parole guidelines based on offense severity and offender characteristics [57] and that Congress endorsed the Commission's use of its guidelines to reduce the effects of sentencing disparity and to achieve a fair and consistent application of its parole authority.

The original version of the Act adopted in the House of Representatives (H.R. 5727, 94th Cong., 1st Sess. (1975)) provided that a prisoner must be released after serving one-third of his sentence unless the Commission determines that the prisoner should not be released because of the prisoner's recividistic tendencies, because release would depreciate the seriousness of the crime, or because release would be "incompatible with the welfare of society." H.R. Rep. No. 91-184, 94th Cong., 1st Sess. 4-5 (1975). This presumptive release provision was removed from the

[57] In hearings before the appropriate subcommittees of the House and Senate Judiciary Committees, Maurice H. Sigler, Chairman of the Parole Board, explained the operation of the guideline system. See *Hearings on Parole Legislation Before the Subcomm. on National Penitentiaries of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 13-16, 30 (1973); *Hearings on H.R. 1598 and identical bills Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. 127-128 (1973).

Senate version of the bill.[58] The Senate amendment to the House bill, which was adopted in Conference, provided that a prisoner was to be *eligible* for release on parole after one-third of his sentence had been served but that, before granting parole, the Commission must determine that the prisoner was a proper candidate for release under the criteria set forth in Section 4206. S. Rep. No. 94-369, 94th Cong., 1st Sess. 22, 23 (1975).

As a result of this difference in approach, the House and Senate versions of this legislation viewed the role of the guidelines somewhat differently. Under the House bill, the Commission was empowered to "establish general policies, guidelines, rules, and regulations * * *, including rules with respect to the factors to be taken into account in determining whether or not a prisoner should be released on parole." On the other hand, the Senate amendment to the House bill authorized the Commission to "promulgate rules and regulations establishing guidelines" for the power, *inter alia*, of "granting or denying parole," and "such other rules and regulation as are necessary to carry out a national parole policy * * *." S. Rep. No. 94-369, *supra*, at 2, 3. It was the Senate version of the guideline provision that was adopted in Conference.

[58] The presumptive entitlement to release that the House proposed at the completion of one-third of the sentence ultimately was provided, under somewhat altered criteria, at the two-thirds point. 18 U.S.C. 4206(d) (limited to prisoners serving a sentence of five years or more). See note 46, *supra*.

Senator Burdick, a major proponent of the Senate version of the Act, explained on the Senate floor that the "rules and regulations" authorized by the legislation "include a set of guidelines adopted by the Parole Board." 121 Cong. Rec. 28833 (1975). He explained the reason why these guidelines should be incorporated into the statutory scheme (*ibid.*):

> These guidelines are based on the seriousness of each criminal offense, and upon those elements of the offender's background that are the best predictors as to whether or not the person is likely to commit another crime * * *.
>
> The guidelines serve two important purposes: They carefully structure the vast discretion presently entrusted to the Federal Parole Authority and decrease uncertainty as to how much time the inmate must serve. This structuring of discretion prevents arbitrary and ill-considered decisionmaking and injects a sense of fair play in every aspect of the parole process.
>
> Because most release criteria are based upon data available at the time of conviction, an inmate can calculate with great accuracy the time he is likely to serve.

See also S. Rep. No. 94-369, *supra*, at 18, 20, 25.

The Conference Committee also expressly approved the continued use of the guidelines the Commission had adopted prior to enactment of the new legislation.

> [T]he promulgation of guidelines to make parole less disparate and more understandable has met with such success that this legislation incorporates the system into the statute, removes doubt

> as to the legality of changes implemented by administrative reorganization, and makes the improvements permanent.

S. Conf. Rep. No. 94-648, *supra*, at 20; H.R. Conf. Rep. No. 94-838, *supra*, at 20.[59] The Conference Reports emphasized that "parole has the practical effect of balancing differences in sentencing policies and practices between judges and courts in a system that is as wide and diverse as the Federal criminal justice system," *id.* at 19,[59a] and that it "is important for the parole process to achieve an aura of fairness by basing determinations of just punishment on comparable periods of incarceration for similar offenses committed under similar circumstances." [60] *Id.* at 26. See also

[59] The court of appeals simply ignored this portion of the Conference Committee Reports in stating that "the conference bill did not contain explicit endorsement of the guidelines as they were currently promulgated" (Pet. App. 43a).

[59a] The reports continued (S. Conf. Rep. No. 94-648, *supra*, at 20; H.R. Conf. Rep. No. 94-838, *supra*, at 20):

> In performing this function, the parole authority must have in mind some notion of the appropriate range of time for an offense which will satisfy the legitimate needs of society to hold the offender accountable for his own acts. * * * The use of guidelines * * * will sharpen this process and improve the likelihood of good decisions.

[60] The disparity in criminal sentences has been strongly criticized. See, *e.g.*, M. Frankel, *Criminal Sentences: Law Without Order* (1973). Moreover, attempts by district courts to reduce sentencing disparity through consultation, sentencing councils and other devices have not been notably successful. See, *e.g.*, Diamond & Ziesel, *Sentencing Councils: A Study of Sentence Disparity and its Reduction*, 43 U. Chi. L. Rev. 109 (1975). Cf. Zeisel & Diamond, *Search for Sentencing Equity: Sentence Review in Massachusetts and Connecticut*, 1977 A.B.F. Research J. 881. The need of the parole system to offset these disparate sentencing policies to achieve a consistent parole policy was a significant factor in the adoption of the guidelines method by Congress. See *Banks* v. *United States*, 553 F.2d 37, 40 (8th Cir. 1977).

S. Rep. No. 94-369, *supra*, at 18. The Conferees emphasized that decisions under the guidelines would "achieve both equity between individual cases and a uniform measure of justice," goals that cannot be achieved unless the Commission applies a uniform standard of offense seriousness that is independent of the views of individual sentencing judges. H.R. Conf. Rep. No. 94-838, *supra*, at 26.

The Conferees also stated that, in making parole release decisions, the Commission should first reach a judgment on the prospective parolee's institutional behavior and then review and consider both the nature and circumstances of the offense and the history and characteristics of the prisoner. S. Conf. Rep. No. 94-648, *supra*, at 25; H.R. Conf. Rep. No. 94-838, *supra*, at 25. These are the very factors that the Commission had employed since 1973 in making parole decisions under the guidelines. Congress anticipated that the vast majority of parole release decisions would be based on guidelines incorporating these factors, and that deviations from the guidelines would be warranted only on a determination of good cause. 18 U.S.C. 4206(c); see 122 Cong. Rec. 4861 (1976) (remarks of Sen. Burdick); S. Conf. Rep. No. 94-648, *supra*, at 23, 27; H.R. Conf. Rep. No.

94-838, *supra*, at 23, 27.[61] Nothing in the legislative history suggests that a judge's view of the seriousness of an offense always is "good cause" for deviation from the guidelines. To the contrary, Congress recognized that "[d]eterminations of just punishment are part of the parole process" and thus approved a guideline system that gives substantial weight to the *Commission's* view of "just punishment." S. Conf. Rep. No. 94-648, *supra*, at 26; H.R. Conf. Rep. No. 94-838, *supra*, at 26.

The legislative history thus demonstrates that Congress intended the Commission, operating within the guideline system, to reduce the disparity that is associated with sentencing by individual judges, who may give dramatically different sentences to similarly situated offenders. Congress, by approving the use of guidelines, provided for a fair and more uni-

[61] The conferees noted that under the Act, the Commission's guidelines "shall provide a fundamental gauge by which parole determinations are made" and that "[i]f decisions to go above or below parole guidelines are frequent, the Commission should reevaluate its guidelines." S. Conf. Rep. No. 94-648, *supra*, at 26, 27; H.R. Conf. Rep. No. 94-838, *supra*, at 26, 27.

As Representative Kastenmeier explained, in describing the differences between the House and Senate versions and the compromises reached by the Conference Committee (122 Cong. Rec. 5163 (1976):

> The primary disagreement between the House and Senate was the question of how much discretion should be retained by the Commission in making release determinations once a prisoner is in fact eligible for parole. This was resolved by increasing the role of the parole determination guidelines and by granting the Commission the option of acting outside the guidelines in extraordinary cases.

form application of the Commission's paroling discretion. See *Banks* v. *United States*, 553 F.2d 37, 40 (8th Cir. 1977). The history of the Act demonstrates that Congress was aware of how the guidelines operated and intended the Commission to continue to exercise its broad discretion under the guidelines. See *Garcia* v. *United States Board of Parole*, 557 F.2d 100, 107 (7th Cir. 1977); *Banks* v. *United States*, *supra*, 553 F.2d at 40. Congress not only approved the guidelines but also provided that the Commission's exercise of discretion in individual cases was to be immune from judicial review. 18 U.S.C. 4218(d). The Conference Committee repeatedly emphasized that the weighing of factors was absolutely committed to the Commission's discretion.[62] This fully establishes that the Commission, rather than the courts, is to decide how much (if any) weight to give to the sentence actually imposed in a given case. In the view of Congress and the Commission, it is the

[62] "[I]t is the intent of the Conferees that the Parole Commission make certain judgments pursuant to [Section 4206], and that the substance of these judgments is committed to the discretion of the Commission." S. Conf. Rep. No. 94-648, *supra*, at 25; H.R. Conf. Rep. No. 94-838, *supra*, at 25.

"The Conferees are in complete agreement with the Fifth Circuit holding in *Scarpa* v. *U.S. Board of Parole*, 477 F.2d 281 (1973), vacated as moot, 414 U.S. 809, that the weight assigned to individual factors (in parole decision making) is solely within the province of the (commission's) broad discretion." *Id.* at 28.

"It is the intent of the Conferees that Commission decisions involving the grant, denial, modification or revocation of parole shall be considered actions committed to agency discretion * * *." *Id.* at 36.

nature of the offense itself, and not a particular district judge's evaluation of that offense, that should be given dominant weight.

2. *18 U.S.C. 4207 does not require the Commission to give weight to sentence length*

Respondent argued in the court of appeals (Pet. App. 38a) that 18 U.S.C. 4207 requires the Commission to consider sentence length in individual parole determinations. This provision directs the Commission to consider the following specific information "if available and relevant:" (1) reports and recommendations by the prison staff; (2) the prisoner's prior criminal record; (3) presentence investigation reports; (4) the sentencing judge's "recommendations regarding the prisoner's parole" made at the time of sentencing,[63] and (5) reports of physical, mental or psychiatric examinations of the prisoner. 18 U.S.C. 4207(1)-(5). Obviously, none of these specific provisions requires the Commission to give weight to sentence length.

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[63] The Conference Reports note that "if a judge has not commented on the sentence or parole of the offender, the Commission is under no duty to solicit such commentary." S. Conf. Rep. No. 94-648, *supra* at 28; H.R. Conf. Rep. No. 94-838, *supra*, at 28. It follows that the actual sentence imposed by the district court is not, by itself, a "recommendation" regarding parole within the meaning of this provision. If, at the time of sentencing, the court explains its reasons for giving a particularly harsh or particularly lenient sentence, that information will be considered by the Commission under 18 U.S.C. 4207(4).

Respondent apparently maintains (Pet. App. 38a), however, that the Commission must give substantial weight to sentence length in making parole decisions because Section 4207 also requires the Commission to consider such "additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available." It seems unreasonable to assume that, in directing the Commission to consider "additional relevant information," Congress imposed a requirement that sentence length be given weight in every case. It would have been simple enough for Congress to have specified such a requirement had that been what Congress intended. But, in any event, the legislative history makes clear that Congress did not seek to impose such a requirement. The Conference Reports state (S. Conf. Rep. No. 94-648, *supra*, at 28; H.R. Conf. Rep. No. 94-838, *supra*, at 28):

> The relevance of material before the Commission is a determination committed to the agency's discretion. Moreover, this provision [section 4207] should not be construed as setting out priorities or assigning weights to the information before the Commission in the parole release process. The Conferees are in complete agreement with the Fifth Circuit holding in *Scarpa* v. *U.S. Board of Parole*, 477 F.2d 281 (1973), vacated as moot, 414 U.S. 809, that the weight assigned to individual factors (in parole decision making) is solely within the province of the (commission's) broad discretion.

Because the Commission, in the exercise of discretion that Congress has provided, has determined that the length of the judicial sentence is not relevant either in establishing guidelines or in discretionary parole determinations, there is no basis for interpreting Section 4207 to require the Commission to consider sentence length as "additional relevant information."

3. *The Constitution does not require the Commission to give weight to sentence length in discretionary parole determinations*

The court of appeals stated that it had "constitutional doubts" about the validity of the Act if it does not require the Commission to "take account of the sentence imposed by the court" (Pet. App. 46a) in its discretionary parole determinations. The court thought that the Commission's disregard of sentence length would erode judicial power, "nullify the discretion which the trial judges are required to exercise" (*id.* at 48a-49a), undermine "the constitutional protections provided by an independent judiciary" (*id.* at 50a), and amount to a delegation to the Commission of Congress' power to "redraft[] the penalty provisions of the United States criminal code" (*id.* at 52a; footnote omitted).

These dire charges are quite unsupported. Nothing that the Commission does changes the sentence selected by the court or the range of sentences established by statute. Congress, courts and the Commission play independent and distinct roles in the proc-

ess of determining how long a prisoner spends in jail. Congress defines the offenses and sets limits on sentences that may be imposed by courts. The sentencing court is empowered to select, within these statutory limits, a maximum and minimum term of imprisonment. The Commission is free, within these judicially-set limits, to select the date of release.

Congress has established important restrictions on the power of courts to prescribe the actual amount of time any prisoner serves. See pages 52-53, *supra*. A court cannot set a parole eligibility date that is more than one-third of the maximum term it imposes. 18 U.S.C. 4205(b)(1). It may not "split" a sentence between imprisonment and probation unless the imprisonment to be served is no more than six months. 18 U.S.C. 3651. The court may modify its sentence during the first 120 days after it becomes final, but that time cannot be extended. Fed. R. Crim. P. 35, 45(b).[64]

The authority to grant parole is vested in the Parole Commission exclusively. 18 U.S.C. 4203(a)(1). See *United States* v. *Grayson*, 438 U.S. 41, 47 (1978). The Commission exercises this authority within the period between the earliest eligibility for release and the date of mandatory release established by good time credits. Since parole is not simply a

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[64] This Court has before it the question whether a district court may revise a lawful sentence on collateral attack when decisions of the Parole Commission "frustrated the sentencing judge's expectations." *United States* v. *Addonizio*, No. 78-156, argued March 27, 1979.

way of enforcing the court's sentence, but instead "originated as a form of clemency," S. Conf. Rep. No. 94-648, *supra*, at 19, there is no reason why Congress *must* direct the Parole Commission to "take account" (Pet. App. 46a) of the sentencing decision made by the Court. A decision to afford relief from a lawfully-imposed sentence thus need not, as a constitutional necessity, give consideration to the initial assessment of just punishment made by the sentencing court.[65]

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[65] The court of appeals also appears to have concluded that Congress could not delegate to the Commission the power to determine appropriate terms of incarceration for classes of violators because that would amount to "redrafting the penalty provisions of the United States criminal code" (Pet. App. 52a). The court's analysis is based on hyperbole. The Commission's actions cannot alter the terms of any judicially-imposed sentence or the penalty provisions of the criminal laws on which such sentences are based. The guidelines cannot be applied to detain a prisoner beyond his maximum release date or to release him before he first becomes eligible for parole. It is only when the Commission has discretion to consider parole that its guidelines become applicable.

There is no basis for doubting that Congress may act to provide for a consistent and fair parole policy to guide the exercise of the Commission's discretion. Certainly such congressional action is in furtherance of rational purposes. Congress could even provide that all sentences must be indeterminate, placing the full power to grant release in the hands of parole authorities or a form of sentencing commission. (See the Federal Youth Corrections Act, 18 U.S.C. 5005-5026, which establishes an indeterminate sentence procedure.) If indeterminate sentences, which bar courts from *any* role in selecting a release date, are not unconstitutional, then the application of the Commission's guidelines within judicially-selected ranges cannot be unconstitutional.

IV

APPLICATION OF THE PAROLE RELEASE GUIDELINES TO PRISONERS WHO WERE SENTENCED PRIOR TO THE EFFECTIVE DATE OF THE GUIDELINES DOES NOT VIOLATE THE EX POST FACTO CLAUSE

The court of appeals stated that the guidelines restrict the broad discretion that the Commission previously had exercised in its parole decisions and that, by unduly structuring the parole process, the guidelines deprive prisoners "of the possibility of a substantially more lenient punishment" (Pet. App. 58a). The court reasoned that "the possibility of a substantially more lenient punishment" was a part of each prisoner's sentence prior to promulgation of the guidelines, and that depriving prisoners of this "possibility" would constitute increased punishment in violation of the Ex Post Facto Clause (*id.* at 58a-65a). Although it appeared to the court that the guidelines act as an "unyielding conduit" to impose substantial limitations on the Commission's discretion to grant parole, and that application of the guidelines to previously sentenced prisoners therefore violates the Ex Post Facto Clause, the court directed the district court to hold a factual hearing on the issue on remand.[66]

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[66] The court suggested that the guidelines might be constitutional "if in practice the parole authorities found good cause to deviate from the guidelines in 60% of the cases * * *" (*id.* at 64a). The court noted that the Parole Commission admitted that parole was granted prior to the customary release date under the guidelines in only 8.7% of the cases (*ibid.*).

The court of appeals erred in considering any Ex Post Facto Clause question. Even if this case is not moot, and even if the district court had some responsibility to construct subclasses, no certifiable subclass could be constructed that presents any question about the ex post facto application of the guidelines. Respondent was sentenced on January 25, 1974, two months after the guidelines were promulgated. Respondent's sentence was reduced in October 1975 for the sole purpose of taking the effect of the guidelines into account (see pages 7-8, *supra*). Application of the guidelines to respondent's sentence was fully anticipated by the sentencing judge. Consequently, respondent could not represent any subclass of prisoners who were sentenced before the adoption of the guidelines, or any subclass of prisoners for whom the guidelines produced an unexpected effect. See *East Texas Motor Freight System, Inc.* v. *Rodriguez, supra; Kremens* v. *Bartley, supra; O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974).

If the Court disagrees with this submission, however, then it must evaluate the court of appeals' analysis of the ex post facto arguments. That analysis is flawed in two major respects. First, application of the parole guidelines to previously sentenced prisoners does not deprive them of any preexisting right or impose any additional punishment. Both before and after adoption of the guidelines, prisoners had no right to release on parole at any particular point; instead, prisoners simply become "eligible" for parole at the Commission's discretion. The guidelines do not affect the date of parole eligibility. They are an exercise, rather than a reduction, of the Commission's discretion. They thus do not constitute an ex post facto law under this Court's decisions. Second, the guidelines do not remove the possibility that a substantially more lenient punishment may result for individual prisoners. By providing broad ranges of customary release dates for various categories of offenders and offenses, the guidelines do not remove the possibility that a parole decision will be made for an earlier (or later) release date whenever the circumstances warrant. 28 C.F.R. 2.20(b), (c), (d), (e), (g).[67]

A. The Parole Guidelines Are Not A Change Of Law That Deprives Prisoners Of A Preexisting Right Or Imposes A Greater Punishment

The Constitution forbids both Congress and the States from enacting an "ex post facto Law." Art. I, § 9, cl. 3; Art. I, § 10, cl. 1.[68] This Clause prohibits enactment of any statute

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[67] Courts other than the Third Circuit have sustained the Commission's practices against challenges based on the Ex Post Facto Clause. See *Zeidman* v. *United States Parole Commission*, No. 78-1590 (7th Cir. Mar. 20, 1979); *Rifai* v. *United States Parole Commission, supra; Shepard* v. *Taylor*, 556 F.2d 648, 654 (2d Cir. 1977); *Ruip* v. *United States*, 555 F.2d 1331, 1335-1336 (6th Cir. 1977). But cf. *Rodriguez* v. *United States Parole Commission*, No. 78-2051 (7th Cir. Mar. 20, 1979), discussed at note 74, *infra*.

[68] Although the Clause applies only to legislative enactments, its terms, enforced through the Due Process Clause, apply to the actions of the Judicial and Executive Branches and require fair warning of proscribed conduct and the penalties attached thereto. *Marks* v. *United States*, 430 U.S. 188, 191 (1977). See *Rodriguez* v. *United States Parole Commission, supra*, slip op. 7. We thus concede that ex post facto principles apply to the Commission's actions.

> which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed.

Dobbert v. *Florida*, 432 U.S. 282, 292 (1977), quoting *Beazell* v. *Ohio*, 269 U.S. 167, 169-170 (1925). See *Calder v. Bull*, 3 U.S. (3 Dal.) 386, 390 (1798). The Clause does not, however, prohibit every change of law that "may work to the disadvantage of a defendant * * *." *Dobbert* v. *Florida*, *supra*, 432 U.S. at 293. It is intended to secure "substantial personal rights" from retroactive deprivation and does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *Ibid.*, quoting *Beazell* v. *Ohio*, *supra*, 269 U.S. at 171.

The parole guidelines do not constitute an ex post facto law under these decisions because they neither deprive prisoners of any preexisting right nor enhance the punishment imposed. The guidelines do not, of course, affect the maximum term of imprisonment that a prisoner may be required to serve. The statutory range of punishments does that. The guidelines do not set the sentence in any case, either. The judicially-selected term, in combination with "good time" credits, determines that. 18 U.S.C. 4163. The guidelines do not affect the minimum term of imprisonment that the prisoner *must* serve; that is determined by the court's choice among sentencing options. See 18 U.S.C. 4205(a), (b). The time at

which a prisoner first becomes "eligible" for parole is thus determined by the sentencing court and the sentencing statutes and is not affected by the guidelines. The guidelines operate only to provide a framework for the Commission's exercise of its statutory discretion to grant parole to an "eligible" prisoner. The court of appeals reasoned, however, that, even if the guidelines cannot enhance the judicially-imposed sentence, they may abridge the prisoner's preexisting right to be considered for parole as soon as he is eligible (Pet. App. 60a, 62a, 64a).

The court's reasoning misconceives what it means to be "eligible" for parole. Eligibility simply means that the Commission has *authority* to grant parole; eligibility alone creates no entitlement to or justifiable expectation of parole.[69] Under the statute that existed prior to the adoption of the guidelines, and under the new Act as well, the Commission has been given essentially complete discretion to determine whether an "eligible" prisoner should be released on parole. The greater articulation of the components of this discretion in the new Act did not alter the fact that the Commission's determination to grant or deny parole is "committed to agency discretion." 18 U.S.C. 4218(d). See also note 62, *supra*. While "the 1976 standards may have announced an emphasis

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[69] Indeed, as we contend in *Greenholtz* v. *Inmates*, No. 78-201, argued Jan. 17, 1979, eligibility for parole does not create a legitimate claim of entitlement to release. Much of our reasoning in *Greenholtz* is applicable to this case as well, and we have furnished a copy of our brief in *Greenholtz* to counsel for respondent.

on certain parole release considerations, * * * they did not abridge the Commission's authority to emphasize others within its discretion." *Rifai* v. *United States Parole Commission*, *supra*, 586 F.2d at 699. Under the new Act as well as the old, "[p]arole is neither a matter of right for the inmate nor a matter of grace for the state, it is a matter of administrative discretion." S. Rep. No. 94-369, *supra*, at 19.[70]

Because of this, if the Commission chooses to exercise its discretion to not grant parole to an "eligible" prisoner—or even to a category of "eligible" prisoners—these prisoners are not being deprived of their right to be considered for parole when "eligible." Instead, even though they are "eligible," the Commission has exercised its discretion to deny them parole. Prisoners are not, and never were, entitled to more. Thus, even if we assume that in some contexts the

[70] See 121 Cong. Rec. 15702 (1975) ("we do not weaken or change or liberalize the standards applied by the Commission whether or not the individual is released") (remarks of Rep. Kastenmeier, chairman of the responsible subcommittee); 121 Cong. Rec. 15710 (1975) ("[T]he standards which the [Commission] will be applying if this bill is enacted, will be identical to the standards which the [Commission] relies on now. They will look at a prospective parolee's past history and behavior in the prison and determine: First. Has the inmate observed the rules of the institution? Second. Will he be able to remain at liberty without committing further criminal acts Third. Will his release deprecate the seriousness of the offense so as to undermine society's respect for the law? Fourth. Will his release be compatible with the welfare of society If, in the opinion of the [Commission], a prisoner can meet all of these criteria, he will be released. This is the way the system works now; but, as the system is currently administered, the [Commission] need not explain its actions to anyone * * *.") (remarks of Rep. Gude).

guidelines categorically defer parole beyond the "eligibility" date for a particular offender (an assumption that we dispute below), the Commission's choice to exercise its discretion in this fashion would not increase the punishment for the offense nor deprive the prisoner of any preexisting right.[71] See *Rifai* v. *United States Parole Commission*, *supra*, 586 F.2d at 698-699.

Neither *Lindsey* v. *Washington*, 301 U.S. 397 (1937), nor *Warden* v. *Marrero*, 417 U.S. 653 (1974), on which the court of appeals relied (Pet. App. 57a-59a), undermines our submission. In *Lind-*

[71] Respondent has suggested (Br. in Op. at 15) that the customary release dates under the guidelines "bear no relation to the 'customary length of imprisonment' served prior to adoption of the guidelines." None of the sources that describe the formulation of the guidelines supports respondent's assertion. Indeed, it has been reported by those involved in the establishment of the guidelines that the customary parole practice of various offender categories prior to the adoption of the guidelines was one of the principal factors used in determining appropriate customary release dates. See Gottfredson, Hoffman, Sigler & Wilkins, *Making Paroling Policy Explicit*, 21 Crime & Delinquency 34, 38-39 (1975); Hoffman & Gottfredson, *Paroling Policy Guidelines: A Matter of Equity* 10 (NCCD Supp. No. 9, 1973). Respondent acknowledged in his complaint (A. 13, para. 42) that the guidelines' release dates are derived in large measure from previous parole practice.

In any event, even if the Commission were exercising its broad discretion in a manner that altered median release dates, that would not constitute an ex post facto enhancement of sentences. The prisoner's *eligibility* for parole is not altered by the Commission's choice to exercise its statutory discretion in one of two alternative ways. In either situation the prisoner is only "eligible" to be paroled in the exercise of the Commission's discretion. The discretion has been unaltered.

sey the Court held that the Ex Post Facto Clause barred application of a statute altering the punishment for a particular crime to conduct occurring before the amendment was enacted. The amendment changed the maximum sentence for the crime from a range of 5 to 15 years to a mandatory sentence of 15 years' imprisonment. As the Court subsequently explained in *Dobbert* v. *Florida*, *supra*, 432 U.S. at 300, although Lindsey "received a sentence under the new law which was within permissible bounds under the old law," the defect in the new statute was that it had "totally eliminated" all discretion for the court to impose a lighter sentence.

The rationale of *Lindsey* is not applicable to this case. The guidelines do not remove the Commission's statutory discretion to consider a prisoner for parole and to release him as soon as he becomes eligible. It was not the *exercise* of discretion to impose a severe penalty that was objectionable in *Lindsey*; rather, it was the statutory removal of a preexisting discretion to impose anything else.[72] *Dobbert* v. *Florida*,

[72] For example, there would have been nothing objectionable in *Lindsey* if the statute had not been amended to remove the sentencing court's discretion and the court had merely concluded, in the exercise of its discretion, that a particular criminal should receive the maximum term of 15 years, even though the court had previously sentenced similar offenders to only 5 to 10 years. In the exercise of its statutory sentencing discretion, the court may revise over time its assessment of the needs of deterrence and retribution. It may thus give lesser or greater sentences to different, though similarly situated, offenders. This is justifiable because each offender is entitled only to the exercise of the

supra, 432 U.S. at 300. It makes no sense to say that the Commission has eliminated its discretion by exercising it. This is especially so because the Commission has retained authority to revise or modify its guidelines whenever appropriate. 28 C.F.R. 2.20 (g).

Warden v. *Marrero* also is consistent with this conclusion. In that case the Court stated in *dicta* that "a repealer of parole eligibility previously available to imprisoned offenders would clearly present the serious question under the *ex post facto* clause * * * of whether it imposed a 'greater or more severe *punishment* than was prescribed by law at the time of the * * * offense.'" 417 U.S. at 663 (emphasis in original), quoting *Rooney* v. *North Dakota*, 196 U.S. 319, 325 (1905). For the reasons we have already discussed, the guidelines do not alter any prisoner's statutory "parole eligibility." A prisoner who is "eligible" for parole is entitled to be considered for parole, not to be paroled. If the Commission determines after applying its guidelines not to parole a prisoner at his initial eligibility, he has not been

court's statutory discretion, and not to any particular sentence within the statutory limits.

Similarly, the Parole Commission may revise its discretionary judgments over time—because of either changing membership or changing assessments of the statutory parole criteria—concerning the appropriate period of incarceration before sentenced prisoners of various categories should ordinarily be released. The prisoners are entitled to the exercise of the Commission's discretion, not to release on parole at any particular date within the eligibility period.

"deprive[d] * * * of the right to be found qualified." *Greenfield* v. *Scafati*, 277 F. Supp. 644, 646 (D. Mass. 1967), aff'd, 390 U.S. 713 (1968). He has simply been found not to be qualified.

B. The Parole Guidelines Do Not Deprive Prisoners Of The Possibility Of More Lenient Parole Decisions

The guidelines do not categorically defer parole beyond the initial date of eligibility for any individual prisoner or class of prisoners. The guidelines provide a range of customary release dates for various offender and offense categories and do not restrict the Commission's discretion to select any particular date within those broad ranges.[73] In many cases (obviously depending on what length of sentence has been imposed), a prisoner's initial parole eligibility date will fall within these customary release ranges. More importantly, however, the Commission may consider a prisoner for release at a date outside the guideline ranges in any appropriate case. For example, where there are mitigating circumstances relating to a particular offense, the Commission may rate the prisoner's offense at a different severity than the normal guideline rating. 28 C.F.R. 2.20(d). Similarly, where the circumstances warrant, a prisoner may be given a different parole prognosis rating than would ordinarily be established under the guidelines. 28 C.F.R. 2.20(e). Furthermore, the Commission has made clear that the guideline release "ranges are merely guidelines. Where the circumstances warrant, decisions outside of the guidelines (either above or below) may be rendered." 28 C.F.R. 2.20(c). The guidelines thus constitute "procedural guideposts"; they are not binding on the agency and do not "have the characteristic of [a] law" subject to the limitations of the Ex Post Facto Clause. *Rifai* v. *United States Parole Commission*, *supra*, 586 F.2d at 698 & n.5; *Ruip* v. *United States*, 555 F.2d 1331, 1335-1336 (6th Cir. 1977). See also *Shepard* v. *Taylor*, 556 F.2d 648, 654 (2d Cir. 1977).[74] Although the guidelines provide a frame-

[73] The customary release range for a "low" offense severity and "very good" offender prognosis is 6-10 months. The greater end of this range exceeds the smaller by approximately 67%. The customary release range for a "greatest" offense severity and "poor" offender prognosis is 85-110 months. The greater end of this range exceeds the smaller by approximately two years, or 29%. See 28 C.F.R. 2.20 (table).

[74] *Rodriguez* v. *United States Parole Commission*, *supra*, held that the principles underlying the Ex Post Facto Clause were violated by the denial of a parole review hearing at the one-third point of a prisoner's sentence, where such a hearing would have been held under practices required by law at the time sentence was imposed. We disagree with the analysis of *Rodriguez*, but even that court noted (slip op. 12 n.9) that its decision was not inconsistent with the conclusion of the court in *Ruip* v. *United States*, *supra*, 555 F.2d at 1335, that the guidelines are merely "guideposts which assist the Parole Commission in exercising its discretion."

Similarly, in *Shepard* v. *Taylor*, *supra*, the Second Circuit held that the retroactive application of a statute that substantially altered the criteria for parole of persons sentenced under the Federal Youth Corrections Act was prohibited under the Ex Post Facto Clause. But in the case of an adult offender, the court stated, the guidelines do not constitute impermissible ex post facto laws because "they merely clarify the exer-

work for the fair and consistent application of parole policy, they do not remove the possibility of substantially more lenient treatment where the Commission concludes that the circumstances warrant it.[75]

Despite the evidently broad authority reserved by the Commission to make decisions independently of the guidelines, the court of appeals concluded that the Commission's practice under the guidelines would have an impermissible ex post facto effect if it were shown that less than 60% of decisions were made outside the guidelines (Pet. App. 64a). This conclusion was apparently based on the court's belief that prior parole practice had produced substantially more varying results (*i.e.*, that parole was granted erratically) and that each prisoner sentenced prior to adoption of the guidelines is entitled to a continuation of the prior, more disparate parole practice. This

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cise of administrative discretion without altering any existing considerations for parole release." 556 F.2d at 654.

[75] 18 U.S.C. 4206(c) does not remove this discretion by directing the Commission to make decisions outside the guidelines only when there is "good cause" for doing so. The determination of "good cause" in particular cases is an element of parole decisionmaking that is committed to the Commission's discretion. See 18 U.S.C. 4218(d); S. Conf. Rep. No. 94-648, *supra*, at 25, 36; H.R. Conf. Rep. No. 94-838, *supra*, at 25, 36. In making this determination, the Commission may rely on any factor that is "not arbitrary, irrational, unreasonable, irrelevant or capricious." *Id.* at 27. Although Congress expected the Commission to act within the guidelines in most cases in order to achieve "more uniformity and greater precision in the grant or denial of parole," *ibid.*, the Commission remains free to reach determinations in individual cases outside the guidelines in the exercise of its discretion.

analysis, however, simply makes no sense. Although each "eligible" prisoner may be entitled to a reasoned exercise of discretion, he is not (and never was) "entitled" to an arbitrary parole decision. As we have shown above, if the Commission exercises its discretion to obtain fairer, more uniform, and less arbitrary decisions, that does not deprive any prisoner of his right to a discretionary decision.

Moreover, it is difficult to imagine what class-wide or individual remedy the court could direct if its analysis were correct. The guidelines themselves cannot be invalid under the court's theory, because the guidelines leave substantial room for the Commission to reach results outside the customary release ranges. 28 C.F.R. 2.20(b), (c), (d), (e), (g). A class-wide order directing the Commission to apply its guidelines "less frequently" would be useless to any class member.[76] Furthermore, no individual remedy is likely to be appropriate, because it is not possible to

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[76] As we have shown at pages 51-74, *supra*, there is no basis for a requirement, under either the new Act or the old, that the Commission consider sentence length in parole decisions. See also *Battle* v. *Norton*, 365 F. Supp. 925, 931 (D. Conn. 1973). Offense severity and offender characteristics have been emphasized as important parole considerations by the Commission since at least the 1950s. See, *e.g.*, Federal Judicial Center, *Deskbook for Sentencing* V6-7 (1962); Remarks of Richard A. Chappell, Chairman of the Board of Parole, at the November 1964 Institutes on Sentencing, *Federal Parole*, 37 F.R.D. 207, 210 (1964); Board of Parole, *Biennial Report* 22 (1970); Richardson, *Parole and the Law*, 2 National Probation and Parole Association Journal 27 (1956).

determine in any one case whether a prisoner denied parole under the guidelines would have received a more favorable parole disposition under former practice.[77] This emphasizes the error in the court's analy-

[77] The guidelines may change many release decisions by bringing all release decisions closer to the norm. But this does not help a court to determine whether any particular prisoner would have been released differently absent the guidelines, especially since the guidelines are based on prior parole practice. See pages 55-58, *supra*.

Statistics prepared by the Commission's staff show that the implementation of the guideline system has not extinguished any previously-existing substantial probability of release. During 1966 to 1970, 54.5% of all adult prisoners (and 59% of all adult prisoners serving regular sentences) were held in jail until the expiration of their sentences. Board of Parole, *Biennial Report* 20 (1970). In other words, some 60% of persons situated similarly to respondent never received parole. This is consistent with the understanding of the Conference Committee in 1976, which reported that "approximately 35 per cent of all Federal offenders who are released, are released on parole." S. Conf. Rep. No. 94-648, *supra*, at 19; H.R. Conf. Rep. No. 94-838, *supra*, at 19.

Other data compiled from the independent study of the National Commission on Crime and Delinquency show that in 1970 and 1972, of persons who received sentences (exceeding one year) under 18 U.S.C. 4205(a), 20.5% were released within two months of the one-third point of their sentences, 16.9% were released sometime after then but before mandatory release on good time credits, and 62.6% were held until mandatory release. The Commission's current data show that, of adult prisoners sentenced under the statute who were granted initial parole hearings from October 1977 to March 1978, 18.7% were released at or soon after one-third, 22.5% after then, and 58.8% held until mandatory release.

Of prisoners sentenced under 18 U.S.C. 4205(b)(2), 23.0% were released in 1970 and 1972 at or within two months of the one-third point, 27.4% were released after then, and

sis: because the court cannot insist that the Commission exercise its discretion to reach one particular result or another in any individual case, the court also cannot direct the Commission to reach arbitrarily different results in similar cases.

49.7% were held until mandatory release. Those prisoners who had initial parole hearings from October 1977 to March 1978 fared as follows: 19.4% released at or soon after one-third, 35.9% released later, and 44.8% held until mandatory release. These figures show that, while more prisoners now are being denied parole at the one-third point than was the case prior to the implementation of the guidelines, a higher percentage of prisoners is now being paroled before the mandatory release date.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded to the court of appeals with instructions that it be dismissed as moot. If the Court concludes that the case is not moot, it should reverse the judgment of the court of appeals and remand with instructions that the complaint be dismissed for failure to state a claim on which relief can be granted.

Respectfully submitted.

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No. 78-572

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

UNITED STATES PAROLE COMMISSION, et al.,

Petitioners,

-vs-

JOHN M. GERAGHTY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT

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-vs-

JOHN M. GERAGHTY,
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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet.App. 1a-73a) is reported at 579 F.2d 238 (3d Cir. 1978). The opinion of the district court (Pet.App. 77a-93a) is reported at 429 F.Supp. 737 (M.D.Pa. 1977).

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1978; rehearing was denied on May 8, 1978. The petition for writ of certiorari was timely filed, by virtue

of two extensions of time, on October 5, 1978. The petitioners invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is an order refusing to allow a case to be maintained as a class action subject to effective appellate review upon an appeal from the final decision of the case?

2. On the facts of this case, did the court of appeals err in reversing the district court's adverse class determination and remanding the case for further consideration of the class issue?

3. Did the court of appeals, in reversing the district court's grant of summary judgment, correctly conclude that if on remand the district court determines that the case should be maintained as a class action, the plaintiff class is entitled to a trial on the merits of their detailed factual allegations that the federal parole guidelines are unlawful or unconstitutional, either on their face or as applied?

ADDITIONAL STATUTES AND REGULATIONS INVOLVED

In addition to the constitutonal provisions, statutes, rules, and regulations set out in Pet.Br. 3-7, this case involves:

1. 18 U.S.C. §4205(g):

At any time upon motion of the Bureau of Prisons, the court may reduce any minimum term to the time the defendant has served. The court shall have jurisdiction to act upon the application at any time and no hearing shall be required.

2. 18 U.S.C. §4208(g):

If parole is denied, a personal conference to explain the reasons for such denial shall be held, if feasible, between the prisoner and the Commissioners or examiners conducting the proceeding at the conclusion of the proceeding. When feasible, the conference shall include advice to the prisoner as to what steps may be taken to enhance his chance of being released at a subsequent proceeding,

3. 28 C.F.R. §2.12, which provides in pertinent part as follows:

2.2 Initial hearings: Setting presumptive release dates

(a) An initial hearing shall be conducted within 120 days of a prisoner's arrival at a federal institution, or as soon thereafter as practicable, in the following cases:

(1) A prisoner with no minimum term of imprisonment; and

(2) A prisoner with a minimum term of imprisonment and a maximum term or terms of less than seven years.

(b) In the case of prisoners with a minimum term of imprisonment and maximum term or terms of seven years or more, an initial hearing shall be conducted at least thirty days prior to the completion of the minimum term of imprisonment, or as soon thereafter as practicable.

(c) Following initial hearing: (1) The Commission shall set a presumptive release date (either by parole or by mandatory release), or set an effective date of parole, in the case of every prisoner with a maximum term or terms of less than seven years.

* * *

4. 28 C.F.R. §2.19 (as amended by 44 Fed.Reg. 26550 (May 4, 1979);

§2.19 Information considered

(a) In making a determination under this chapter (relating to release on parole) the Commission shall consider if available and relevant:

(1) Reports and recommendations which the staff of the facility in which such prisoner is confined may make;

(2) Official reports of the prisoner's prior criminal record, including a report or record of earlier probation and parole experiences;

(3) Pre-sentence investigation reports;

(4) Recommendations regarding the prisoner's parole made at the time of sentencing by the sentencing judge and prosecuting attorney; and

(5) Reports of physical, mental, or psychiatric examination of the offender.

(b) There shall also be taken into consideration such additional relevant information concerning the prisoner (including information submitted by the prisoner) as may be reasonably available (18 U.S.C. 4207). The Commission encourages the submission of relevant information concerning an eligible prisoner by interested persons.

(c) The Commission may take into account any substantial information available to it in establishing the prisioner's offense severity rating, salient factor score, and any aggravating or mitigating circumstances, provided the prisoner is apprised of the information and afforded an opportunity to respond. If the prisoner disputes the accuracy of the information presented, the Commission shall resolve such dispute by the preponderance of the evidence standard; that is, the Commission shall rely upon such information only to the extent that it represents the explanation of the facts that best accords with reason and probability. However, the Commission shall not consider in any determination, charges upon which a prisoner was found not guilty after trial unless reliable information is presented that was not introduced into evidence at such trial (e.g., a subsequent admission or other clear indication of guilt).

(d) Recommendations and information from sentencing judges, defense attorneys, prosecutors, and other interested parties are welcomed by the Commission. In evaluating a recommendation concerning parole the Commission must consider the degree to which such recommendation provides the Commission with specific facts and reasoning relevant to the statutory criteria for parole (18 U.S.C. 4206) and the application of the Commission's guidelines (including reasons for departure therefrom). Thus, to be most helpful, a recommendation must state its underlying factual basis and reasoning. However, no recommendation (including a prosecutorial recommendation pursuant to a plea agreement) may be considered as binding upon the Commission's discretionary authority to grant or deny parole.

STATEMENT

In 1973, the federal parole board adopted[1] explicit parole release criteria -- the parole "guidelines" --for adult prisoners.[2] Because these guidelines are "loosely based" upon the board's policies in Youth Correction Act

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1 The parole guidelines were first issued on November 19, 1973. 38 Fed.Reg. 31942 (1973). Following Pickus v. United States Board of Parole, 507 F.2d 1103 (D.C. Cir. 1974), which held that promulgation of the guidelines was governed by the publication and notice standards of the Administrative Procedure Act, 5 U.S.C. §553, the guidelines were repromulgated on an emergency basis, 39 Fed.Reg. 45296 (1974), and were reissued on September 5, 1974, 40 Fed.Reg. 41328 (1975). With the effective date of the Parole Commission and Reorganization Act of 1976, Pub.L. 94-233, 90 Stat. 219-33 (1976), the newly named United States Parole Commission repromulgated the existing guidelines on an emergency basis. 41 Fed.-Reg. 19330-31, 19341 (1976). Subsequent revisions appear at 41 Fed.Reg. 37322 (1976), 42 Fed.Reg. 12045 (1977), 42 Fed.Reg. 31786(1977), and 42 Fed.-Reg. 52399 (1977). The most recent guidelines became effective on June 4, 1979, and appear at 44 Fed.Reg. 26542-48 (May 4, 1979).

2 Explicit parole release criteria were held to be constitutionally required in Childs v. United States Board of Parole, 371 F.Supp. 1246 (D.D.C. 1973). The parole board acquiesced in that portion of the district court's decree. See 511 F.2d 1270, 1273-74 (D.C. Cir. 1974) (affirming other portions of the decree which had been challenged by the board).

cases,[3] in which there is no judicially set length of sentence,[4] the adult guidelines make the parole release decision depend primarily on whether the prisoner has served a "customary length of imprisonment" which does not consider the actual sentence imposed, the facts of the particular criminal act, in prison conduct, or any other indicia of rehabilitation. The "customary length of imprisonment" in fact exceeds the actual sentence imposed on at least 60% of all persons convicted of federal offenses,[5] and in less than seven percent of all

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3 Complaint, ¶30 (App. 11), admitted in petitioners' Return and Answer. (App. 25.)

4 A committed youth offender may be released at any time after incarceration. 18 U.S.C. §5017(a).

5 Over half of all persons convicted of federal offenses are sentenced to probation. See Administrative Office of the United States Courts, Federal Offenders in the United States District Courts 1974, 5 (1978). For those sentenced to a term of probation, the "customary length of imprisonment," of course, is zero. As to persons sentenced to imprisonment, information provided by the board in this case shows that almost 25% of persons who are eligible for parole are denied parole because their sentences are too short to allow them to serve the "customary length of imprisonment" of the guidelines. According to a spokesman for the Office of Improvements in the Administration of Justice of the Department of Justice, "approximately 50 percent of the defendants sentenced to imprisonment . . . are eligible for parole at the time

footnote continued

cases will parole be granted before a prisoner has served this "customary length of imprisonment."[6] The result is that 27% of all prisoners, who, receive "lenient" prison sentences, are routinely denied parole.[7]

The situation of John M. Geraghty, the named plaintiff, is typical of the several thousand prisoners who each year are denied parole through application of the parole guidelines.[8] Geraghty initially received a 48

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recommended in the guidelines. . . " Hearings on S. 1437 before the Subcomm. on Criminal Laws and Procedure of the Sen. Comm. on the Judiciary, 95th Cong., 1st Sess., pt. 12, at 9000 (1977). By subtraction, the result is that 25% of all prisoners have sentences of such length that they do not even become eligible for parole until after they have served their "customary length of imprisonment."

6 In fiscal year 1975, 91.3% of all prisoners were required to serve at least their "customary length of imprisonment" before being paroled. The percentage increased slightly to 93.2% in 1976 and was relatively unchanged in 1977 at 93.4%. Stone-Meierhoefer, Workload and Decision Trends Statistical Highlights 10/74-9/77, 10 (U.S. Parole Commission Research Unit Rep. 18, 1977.)

7 Information provided by the board in this case shows that 6151 initial parole hearings were held from October, 1977 to March, 1978, and that in 1635 of those hearings, parole was denied because the prisoner would completely serve his (or her) sentence before he (or she) could serve the "customary length of imprisonment" of the guidelines.

8 Approximately 10,000 prisoners are considered for parole each year. Stone-Meierhoefer, supra note 6, footnote continued

month sentence, imposed under the provisions of 18 U.S.C. §4208(a)(2) (1970).[9] (Complaint, ¶4, App. 3-4.) Although this sentence was subsequently reduced to 30 months on a timely motion under Rule 35 of the Federal Rules of Criminal Procedure, see United States v. Braasch, 542 F.2d 442 (7th Cir. 1976), Geraghty was nonetheless denied parole because his "customary length of imprisonment" was set by the parole board as 36 to 48 months. (Complaint, ¶7-¶12, App. 5-6.)

Geraghty believed that he, along with thousands of others, had been denied parole by an arbitrary and irrational system, unauthorized by the parole statute, and with the assistance of counsel brought this action individually and on behalf of a class to challenge the legality of the guidelines. (App. 3-15.) Geraghty sought a prompt determination of whether the case could be maintained as a class action by filing a motion to certify

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at 1. The percentage of prisoners who are denied parole has varied from 41.2% in fiscal year 1975 to 46.7% in fiscal year 1976 to 55.9% in fiscal year 1977. Id. at 7.

9 In their Return and Answer (App. 24-27), petitioners admitted the allegation of paragraph 27 of the Complaint (App. 10) that a prisoner sentenced under 18 U.S.C. §4208(a)(2) (1970) (renumbered as 18 U.S.C. §4205(b)(2) in the PCRA) is considered for parole under the same guidelines as a prisoner who had received a regular adult sentence.

the case as a class action with his complaint. (App. 17.) In addition, Geraghty sought interim individual relief so that his personal claim would not be rendered moot by the impending expiration of his sentence. (App. 18, 19.)

Without ruling on Geraghty's motions,[10] the District Court for the District of Columbia[11] transferred the case to the Middle District of Pennsylvania (App. 1), where Geraghty was then confined. Following transfer of the case, Geraghty renewed his request for class certification and his application for interim relief.[12] The district

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10 Geraghty's attempt to remedy this inaction by recourse to a writ of mandamus was denied without opinion. In re Geraghty, No. 76-1975 (D.C. Cir., Nov. 16, 1976).

11 The case had been filed in the District of Columbia as a related case to Cale v. Attorney General, No. 75-1822 (D.D.C.), appeal dismissed as moot, 543 F.2d 416 (D.C. Cir. 19786) (table). Cale had been brought as a non-class "test case" by four of Geraghty's co-defendants, and raised the same issues subsequently advanced by Geraghty. Cale, though, became moot when the interests of the named plaintiffs was extinguished by their release from prison. It was because of the possibility of mootness that Geraghty brought this case as a class action.,

12 Geraghty also filed an amendment to his complaint, adding an individual habeas corpus claim and joining the Warden of the Allenwood Prison Camp as a party. (App. 20-23.) It is this amendment which brought into the case the issues which

court, however, postponed ruling on the class motion until it was ready to announce its decision on defendants' motion for summary judgment. (The district court never ruled on the application for interim relief.)

In the view of the district court, the case was a habeas corpus action (Pet.App. 80a), to which Rule 23 of the Federal Rules of Civil Procedure was applicable only "by analogy." (Pet.App. 81a-82a.) Under this analogy, class treatment was denied on the ground that it was "neither necessary nor appropriate." (Pet.App. 82a.) Class certification was not "necessary," the district court reasoned, because the class claims could be litigated in an individual action. (Pet.App. 82a.) Class status was deemed to be inappropriate because the issues raised in Geraghty's amendment to the complaint (the individual habeas corpus claim) "have no class wide applicability" (id.), because "not all members of the class have the same interest as plaintiff" (id.), and because the district court "does not have habeas corpus jurisdiction over all members of the proposed class." (Pet.App. 83a.)

On the merits, the district court rejected all of Geraghty's substantive contentions. (Pet.App. 83a-92a.)

"relate solely to plaintiff's individual case" mentioned in the opinion of the district court (Pet.App. 82a) as grounds for refusing to allow the case to be maintained as a class action. Geraghty excluded the denial of individual habeas corpus relief from his notice of appeal (App. 29), and those issues are not involved in the present proceeding.

Geraghty filed a timely notice of appeal. (App. 29.) Thereafter, Eliezer Becher, another prisoner who had been denied parole through application of the guidelines and who was represented by Geraghty's counsel, sought to intervene. (App. 2.) As Becher explained in his petition, intervention was sought to insure that the legal issues raised by Geraghty on behalf of the class "will not escape review in the appeal in this case[13] The district court denied the petition to intervene, concluding that the filing of Geraghty's notice of appeal had divested it of jurisdiction. (App. 2.) Becher then filed a timely notice of appeal from the denial of intervention (id.), and the two appeals were consolidated. (Pet.App. 1a.)

Although the court of appeals expedited the appeals, its decision came after Geraghty had satisfied his sentence.[14] In a comprehensive opinion, Judge Adams held that Geraghty's release from custody did not render the case moot if the district court had erred in refusing to certify the case as a class action. (Pet.App. 10a-28a.) Turning to the class issue, the court of appeals held that the district court should not have viewed the case as a

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13 Petition to Intervene after Judgment, filed April 28, 1977, at 2.

14 Geraghty was mandatorily discharged pursuant to 18 U.S.C. §4164 on June 30, 1977, and satisfied his sentence eight months later, in February of 1978.

habeas corpus proceeding (Pet.App. 7a-10a) or concluded that Rule 23 was applicable only "by analogy." (Pet.App. 28a.) Rather, the case was an ordinary civil action (Pet.App. 7a-10a), subject to the class action standards of Rule 23. (Pet.App. 28a.) Noting that Rule 23 did not include a "necessary" standard as had been employed by the district court, the court of appeals held that the district court had erred in relying on this rationale in refusing to allow the case to proceed as a class action. (Pet.App. 28a.) The case was therefore remanded to the district court with instructions to determine if the proposed class (or, if necessary, a narrower class or subclasses) could satisfy the requirements of Rule 23(a). (Pet.App. 32a & n.66.)

The court of appeals viewed the merits of the substantive class claims only so far as it was necessary to determine that a remand would not "improvidently dissipate judicial effort," which would have been the case if the "district court were correct in its determination that Geraghty's substantive contentions are devoid of merit." (Pet.App. 32a-33a.) The court of appeals noted that material facts were in dispute (Pet.App. 36a n.75), and followed the ordinary rule of viewing the evidence in the light most favorable to Geraghty, the party who had opposed the grant of summary judgment. (Pet.App. 36a.)

Geraghty's substantive contentions were analyzed by the court of appeals in two categories -- whether the parole guidelines are contrary to the parole statute

(Pet.App. 33a-54a), and whether, as applied to certain prisoners, the guidelines are of ex post facto effect. (Pet.App. 46a-65a.) After a careful analysis of the language of the parole statute (Pet.App. 36a-39a), of its legislative history (Pet.App. 39a-46a), and of the constitutional problems which would be present if the guidlines "function as Geraghty alleges" (Pet.App. 48a) and "as automatically as Geraghty alleges" (Pet.App. 52a), the court of appeals concluded that the question of whether the guidelines are consistent with the statute stated claims which "may be disposed of only on a full record." (Pet.App. 54a.) The ex post facto claim was also held to be incapable of resolution on the record before the court. (Pet.App. 65a.)

Rehearing and a suggestion that the case be reheard in banc were denied without opinion. Following issuance of the judgment of the court of appeals, plaintiff moved to add, under Rule 20 of the Federal Rules of Civil Procedure, several prisoners with live personal claims as additional plaintiffs, and the district court received memoranda and held a preliminary hearing on the class question. With the grant of certiorari, however, proceedings in the district court have been stayed, with the court withholding its ruling on the class motion and on the motion to add additional plaintiffs.

SUMMARY OF ARGUMENT

Introduction

This case involves the legality of the guidelines promulgated by the United States Parole Commission (hereafter the "board") in its attempt to comply with 18 U.S.C. §4203(a)(1) (1976), which requires the board to promulgate guidelines to regulate the exercise of its discretion to make parole release decisions. The primary claim asserted by respondent in his class action complaint is that the policies implemented by the guidelines are contrary to those authorized by Congress in the Parole Commission and Reorganization Act ("PCRA"), 90 Stat. 219-31 (1976). The parole board does not deny that it continues to apply the policies challenged in this case to deny parole to unnamed members of the putative class, some of whom have sought to individually participate in these proceedings. Nonetheless, the board's primary arguments are that this case is moot (Pet.Br. 21-43), and that the case may not be maintained as a class action. (Pet.Br. 43-51.) As we show in Part I of our argument, these mootness and class arguments are without merit. In Part II, we show that the same is true for the board's attempt to defend the legality of its guidelines.

I

1. The mootness question raised by petitioners was answered by the Court in United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977). Respondent brought this case as a class suit and diligently sought a ruling from the district court that the case could be maintained as a class action. Although the district court refused to certify the case as a class action, under McDonald, its adverse class determination was subject to effective appellate review on respondent's appeal from the final decision. This was the basis for the Court's rejection of the "death knell" doctrine in Coopers & Lynbrand v. Livesay, 437 U.S. 463 (1978), and for the holding in Gardner v. Westinghouse, 437 U.S. 478 (1978) that an adverse class determination is not appealable as the denial of a preliminary injunction. Petitioners' argument that these cases are contrary to the "case or controversy" requirement of Article III ignores the fact that there is a continuing controversy between petitioners and the unnamed members of the putative class, and that because respondent has diligently sought to act on behalf of the class, he may continue to do so, irrespective of the status of his personal claim.

2. This case does not present the abstract question posed in the Petition for Writ of Certiorari pertaining to a district court's obligation to "sua sponte" evaluate the use of subclasses before refusing to allow a case to be maintained as a class action. Class certification was

denied in this case by the district court for a variety of reasons, including its concededly erroneous conclusion that this was a habeas corpus proceeding to which Rule 23 did not apply, and for which class relief could only be fashioned if "necessary." On this basis, there was no opportunity for the district court to sua sponte consider sub-classes; nor was there any reason for respondent to propose sub-classing when the district court did not rule on the class motion until it announced its final decision, at which time a request for reconsideration of the adverse class determination would have been a useless act.

II

Three revolutionary policies are implemented by the federal parole guidelines. First, rehabilitation is not a factor in the parole release decision. Second, the severity of a prospective parolee's offense is rated in a mechanical fashion, without regard to the facts of the particular case and irrespective of the actual sentence imposed or which could have been imposed. Third, a prisoner can do nothing once he is incarcerated to improve his chances for parole. The central question presented in this case is whether these parole policies have been authorized by Congress. The answer furnished by the court of appeals, reviewing the district court's

grant of summary judgment upholding the guidelines, is that these policies are unlawful. We agree.

1. There is nothing novel about the use of guidelines to aid in parole release decisionmaking. For at least 50 years, guidelines have been used by some parole boards to aid in the determination of when parole should be granted.

2. Many parole boards, though, have been unwilling to rely on statistical aids in making the "equity judgments" involved in the parole release decision. The researchers who created the federal parole guidelines viewed this as a problem of "research utilization," and addressed the problem of how their product should be "packaged" for wider use.

3. The result of this "packaging" effort is a product known as "descriptive guidelines," which purport to objectively describe in a table the way in which the board had been making discretionary decisions. The theory is that these guidelines do not create new policy, but merely insure that fewer decisions will be made in other than the average manner. Whatever the merits of this theory, it was not fairly applied in the creation of the parole guidelines.

4. The first problem with the "descriptive guidelines" created for the board is that they are not descriptive. At best, the guidelines purport only to describe the way in which the board was making release decisions in Youth

Correction Act cases, where all commitments are purely indeterminate. The board's implicit policies in YCA cases, though, were unlawful, because those policies ignored the rehabilitative purpose of the YCA. In addition, the YCA policy -- even if lawful -- was ill suited for application to the 75% of adult prisoners who must serve one-third of their sentence before even becoming eligible for parole.

5. The second problem with the "descriptive guidelines" created for the board is that they completely fail to describe any of the policies which had been followed by the board. The "objective measures" created for the parole guidelines did not reify the YCA policies, but vastly altered the way in which the board made its decisions, and created a new prospective policy, in which rehabilitation and prison performance are irrelevant, and the parole release decision has become a resentencing decision.

6. Congress has not approved the board's revolutionary redefinition of parole. The PCRA emphasizes rehabilitation and prison behavior, and does not authorize the board to resentence prisoners.

We agree with petitioners that the proceedings on remand in the district court will be a formality, because we will have little difficulty in proving whatever facts may still be genuinely disputed by petitioners.

ARGUMENT

I. THIS CONTINUING CONTROVERSY BETWEEN ADVERSE PARTIES IS NOT MOOT

There is no dispute that this case presents a live justiciable controversy between the parole board and the unnamed members of the putative class about the legality of the federal parole guidelines.[15] The only real question raised by petitioners' mootness arguments is whether the extinction of respondent's personal claim before the district court could properly apply the standards of Federal Rule of Civil Procedure 23 to respondent's timely request that the case be maintained as a class action bars him from continuing to represent the unnamed members of the putative class.

This jusi tertii[16] question, however, was answered in favor of continuing justiciability in United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977), Coopers & Lynbrand Livesay, 437 U.S. 463 (1978), and Gardner v. Westinghouse, 437 U.S. 478 (1978). In McDonald, the

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15 Pursuant to 18 U.S.C. §4218, the legality of the parole guidelines is expressly subject to judicial review under the Administrative Procedure Act, 5 U.S.C. §§701-705. As petitioners acknowledge (Pet.Br. 13 n.7), jurisdiction to consider this challenge to the guidelines was conferred upon the ditsriet court by 28 U.S.C. §1331.

16 See Kremens v. Bartley, 431 U.S. 119, 142 (1977) (Brennan, J., dissenting).

Court held that "a district court's refusal to certify [a case as a class action] was subject to appellate review after final judgment at the behest of the named plaintiffs," 432 U.S. at 393, even though the original class representatives had obtained all of the individual relief sought.[17] This holding was the basis for the Court's subsequent rejection of the "death knell" doctrine in Coopers & Lynbrand v. Livesay, supra, and for the holding of Gardner v. Westinghouse, supra, that a district court's refusal to certify was not immediately appealable as the denial of a preliminary injunction. Essential to each of these cases is the principle that an original class representative may continue to represent the unnamed members of the class to prosecute an

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17 Petitioners mistakenly assert (Pet.Br. 38-39) that the plaintiffs in McDonald had not obtained all of the individual relief sought. The final decision entered in the district court in McDonald, though, recited that the complaints of the original and intervening plaintiffs

> are hereby dismissed with prejudice, all matters in controversy with respect to such claims having been settled and resolved. Appendix, United Air lines, inc. v. McDonald, O.T. 1976, No. 76-545, 92.

Thus, petitioners are factually in error in their attempt to characterize McDonald as a case in which the plaintiffs had "not obtained all of the relief that [they] sought." (Pet.Br. 39.)

appeal on their behalf from an adverse class determination. See McDonald, supra at 400 (Powell, J., dissenting).

Petitioners here, and in Fidelity National Bank v. Roper, No. 78-904, nonetheless seek to argue that the case or controversy limitation of Article III bars a litigant who has faithfully, albeit unsuccessfully, sought to act on behalf of a class from seeking review of the district court's refusal to certify if the litigant's personal claim has been extinguished before there can be effective appellate review on an appeal from the final decision. These arguments would reduce McDonald, Coopers & Lynbrand and Gardner to hollow shells and have no place in this case, which continues to present a live controversy between adverse parties. But before discussing the flaws in petitioners' mootness arguments, we turn to petitioners' major premise that the court of appeals erred in remanding the case for consideration of the class issue under the standards of Federal Rule of Civil Procedure 23.

A. THE FEDERAL PAROLE GUIDELINES MAY BE CHALLENGED IN A CLASS SUIT

Respondent brought this case to challenge the legality of the federal parole guidelines, both on their face and as applied.[18] Mindful of the possibility of

18 The primary claim, applicable to all federal prisoners who are considered for parole, is that the guidelines are contrary to the Parole Commission and Reorganization Act ("PCRA"), Pub.L. 94-233, 90 Stat. 219-33 (1976), or that the PCRA is itself unlawful. A second claim, applicable only to persons imprisoned for offenses committed prior to the effective date of the PCRA, is that the guidleines -- if consistent with the PCRA --are of ex post facto effect. A third claim, applicable only to persons sentenced under 18 U.S.C. §4208(a) (1970) (renumbered as 18 U.S.C. §4205(b) in the PCRA), is that the guidelines are inconsistent with the statute. At the time the lawsuit was filed, respondent had standing to raise each claim -- he had been denied parole through application of the guidelines, and he had been sentenced under 18 U.S.C. §4208(a)(2) (1970) for wrongdoing charged in a pre-PCRA indictment.

mootness if he was unsuccessful in obtaining individual interim relief,[19] respondent followed the suggestions made by the Court in prior cases and brought this case as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure.[20]

19 Interim individual relief was unsuccessfully sought with the filing of the complaint. (App. 18, 19.)

20 See, e.g., Brockington v. Rhodes, 396 U.S. 41, 43 (1969) (plaintiff "did not attempt to maintain a class action on behalf of himself and other putative independent candidates, present or future"); De Funis v. Odegaard, 416 U.S. 312, 314 (1974) (plaintiff had "brought the suit on behalf of himself alone, and not as the representative of any class");' Preiser v. Newkirk, 422 U.S. 395, 404 (1975 (Marshall, J., concurring) ("for some reason respondent did not file this case as a class action).

Respondent's complaint contained detailed factual allegations of each of the prerequisites for a class action of Rule 23(a).[21] There has never been any dispute that the number of persons adversely affected by the guidelines is so numerous as to make joinder impractical,[22] and the common questions of law presented in this case are plainly set out in the complaint. (Complaint, ¶5(b), App. 4.) There is nothing atypical about respondent's challenge to the guidelines -- the factual allegations supporting the claims advanced in the complaint (Complaint, ¶17-¶52, App. 7-15), are related to

21 Federal Rule of Civil Procedure 23(a) provides as follows:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative party will fairly and adequately protect the interests of the class.

22 Each year approximately 4000 prisoners are denied parole. Even if the plaintiff class is limited to those persons in custody because they have been denied parole, the class would plainly be of sufficient numerosity to make joinder impracticable. See 1 Newberg, Class Actions 171-76 (1977).

respondent's personal situation only insofar as necessary to show that he has standing to raise each of those claims.[23] Finally, respondent has diligently protected the interests of the putative class, first by promptly requesting (in a motion filed with his complaint (App. 17)), that the case be certified as a classaction, and by continuing to champion the interests of the putative

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23 As a person who was denied parole through application of the guidelines, respondent plainly possessed standing to challenge their legality. East Texas Motor Freight System, Inc. v. Rodriquez, 431 U.S. 395 (1977). In addition, because he was sentenced under 18 U.S.C. §4208(a)(2) for offenses committed prior to the enactment of the PCRA, respondent had standing to bring the ex post facto claim raised in the complaint, and the claim pertaining to the repeal by administrative fiat of Section 4208(a). Petitioners' arguments to the contrary (Pet.Br. 76) confuse the question of standing to bring an action with the question of entitlement to relief on the merits. See United States v. Scrap, 412 U.S. 669 (1973).

Nor is there any merit to petitioners' assertion (Pet.Br. 50 n. 40) that part of the class claim is the allegation that respondent's "offense was rated too severely under the guidelines. Such an allegation does not appear in the original complaint, but was included in the individual habeas corpus claim, filed as an amendment to the complaint. (App. 20-23.) Respondent did not seek to maintain his individual habeas corpus challenge as a class action. The comment of the district court (Pet.App. 82a) that the issues raised in the complaint "have no class wide applicability" is irrelevant.

class through proceedings in the district court, in the court of appeals, and in this Court.[24]

The district court held that Federal Rule of Civil Procedure 23 was inapplicable to this case,[25] and refused to allow it to proceed as a class action. The court of appeals reversed, holding that the case was governed by Rule 23. Although the court of appeals recognized that numerous federal prisoners were adversely affected by the guidelines (Pet.App. 26a), that the case presented common questions of law and fact (Pet.App. 31a), that the nuances of the "major issues in the case in no way appear to be tied to individual fact patterns" (Pet. App. 28a), and that respondent's attorneys had vigorously represented the interests of the

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24 In addition, respondent appeared as amicus curiae in Garcia v. United States Board of Parole, 557 F.2d 100 (7th Cir. 1976). See id. at 107 n.7. Also, the Lewisburg Prison Project, the organization sponsoring respondent's efforts, appeared as an amicus curiae in United States v. Addonizio, ___ U.S. ___ (No. 78156, June 4, 1979).

25 The district court viewed this case as a habeas corpus proceeding (Pet.App. 81a), for which it held that class relief could only be fashioned under the "necessary and appropriate" standards of the All Writs Act, 28 U.S.C. §1651. (Pet.App. 81a-83a.) Although petitioners urged this view of the case in the district court and in the court of appeals, they now concede that this is not a habeas corpus proceeding (Pet.Br. 13 n. 7), and that the class issues are controlled by Rule 23 of the Federal Rules of Civil Proceure. (Pet.Br. 43-51.)

putative class (Pet.App. 27a), it declined to certify the case as a class action in the first instance.[26] (Pet.App. 32a.) In accord with the observation of then Circuit Judge (and now Attorney General) Bell in Oatis v. Crown Zellerbach, 398 F.2d 496, 499 (5th Cir. 1968), that further proceedings in the district court "might be facilitated by the use of subclasses,"[27] the case was remanded to the district court for further consideration of the class action question under the standards of Rule 23.

Petitioners offer two arguments in support of their claim that the court of appeals erred in holding that a class may be certified in this case and in requiring reconsideration of the class issue under the proper standards. These arguments are equally without merit.

1. As we pointed out in our brief in opposition at 13, petitioners are in error in their repeated assertion (Pet. Br. 44, 47) that the court of appeals upheld the conclusion of the disrict court that there are conflicting

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26 Cf. East Texas Motor Freight, Inc. v. Rodriquez, 431 U.S. 395, 403 (1977) (reserving question of whether a case may be certified as a class action on appeal).

27 The opinion of then Judge Bell in Oatis v. Crown Zellerbach, supra, is contrary to the position asserted by petitioner Attorney General Bell here, that "it is frequently preferable simply to deny certification" rather than to define subclasses." (Pet.Br. 49).

interests within the class proposed in the complaint. On the contrary, the court of appeals concluded that "it is not clear that a divergence of interest exists [within the putative class]." (Pet.App. 3la.) This follows from the fact that a successful challenge to the guidelines because they are unlawful will have the same effect regardless of the definition of the plaintiff class: If the present guidelines are unlawful because they are contrary to the PCRA, the board will be required to promulgate new guidelines, and it will not, of course, be able to apply its unlawful guidelines to any prisoners. Under these circumstances, in our view, there is no need to exclude from the plaintiff class any prisoners who may wish the present guidelines to be upheld -this is the "rare case in which a court could use the class opponent to protect the interests of absentee class members." Developments in the Law — Class Actions, 89 Harv.L.Rev. 1318, 1481 (1976).[28] But if the district court disagrees, it may allow the case to be maintained as a class action on behalf of a narrower class, as we suggested before remand

28 In a case challenging the legality of an administrative regulation, reliance upon the agency to protect the interests of any members of the putative class who may wish to see the validity of the regulation upheld is not inconsistent with Hansberry v. Lee, 311 U.S. 32 (1940). See Developments, supra, 89 Harv.L.Rev. at 1482 n. 155; Bolden v. Pennsylvania State Police,. 578 F.2d 912, 918-19 (3d Cir. 1978).

proceedings were stayed after the grant of certiorari.[29] See Eisen v. Carlisle & Jacquelin, 417 U.S.156, 179 n. 16 (1974), Manual for Complex Litigation, §1.41 (1973).

2. Petitioners are also in error in their contention that respondent is somehow an inadequate class representative because he did not "move for reconsideration or propose that subclasses be created." (Pet.Br. 46-47.) This contention ignores the fact that the district court, in a single order, refused to allow the case to be maintained as a class action and denied relief on the merits. At that point, no purpose -- other than delay -- would have been served by moving for reconsideration or in proposing more limited classes, and respondent can hardly be faulted for not having done a useless act.

First, in ruling adversely on the class issue, the district rejected our repeated contentions that this was

29 For example, the class could be redefined to be all federal prisoners who will be denied parole because their sentences are too short to allow them to serve the "customary length of imprisonment" of the guidelines, and who will be denied parole and continued to expiration of their sentences. Respondent was a member of this subclass, which would, of course, have standing to challenge the legality of the guidelines, and would be of sufficient numerosity to make joinder impractical: Information provided by the board in this case shows that from October of 1977 to March of 1978, 1635 prisoners were denied parole and "continued to expiration" because their sentences were too short to allow them to serve the "customary length of imprisonment" of the guidelines.

"an ordinary civil action to which the class act provisions of the Federal Rules of Civil Procedure [apply] . . . " (Pet.App. 81a n. 8.) There is no reason to believe that a request to reconsider the resolution of this issue would have been other than a waste of time.

Second, there would have been no purpose in pointing out to the district court that Rule 23(c)(4) had been adopted in 1966 to give the court authority to allow a case tp be maintained as a class action with respect to particular isssues or to divide the class into appropriate subclasses.[30] See 7A Wright & Miller, Federal Practice and Procedure §1979, at 185. The perceived over-inclusiveness of the class was only one of several reasons for the district court's conclusion that class status was "inappropriate,"[31] and proposing that the case be main-

30 Although the complaint detailed the four common questions presented in the case (Complaint, ¶5(b), App. 4), the district court viewed the question of whether the case could be maintained as a class action as depending upon whether each of these four questions was common to the broad class proposed in the complaint. (Pet.App. 82a-83a.) This was plainly in error: Rule 23(c)(4) vested the district court with ample power "to treat common things in common and to distinguish the distinguishable." Jenkins v. United Gas Corp., 400 F.2d 28, 35 (5th Cir. 1968). See 7A Wright & Miller, Federal Practice and Procedure, §1790 at 186.

31 In addition to the perceived overinclusiveness of the class proposed in the complaint, the district footnote continued

tained as a class action on behalf of sub-classes plainly would not have resulted in a favorable class determination in the district court.

Finally, the district court did not rule on the class issue until it announced its decision on the merits.[32] Because an appeal was necessary to challenge the correctness of the disposition on the merits, little point would have been served by postponing appellate review while we renewed our requests for class certification in the district court.

3. The record in this case simply fails to present the question argued by petitioners (Pet.Br. 43-51) about the alleged need for a district court to sua sponte construct sub-classes after "properly" determining that there is a divergence of interests within a class proposed in a complaint. This case did not present any opportunity for sua sponte action under Rule 23(c)(4) because the district

court held that class certification would be "inappropriate" because it did "not have habeas corpus jurisdiction over all the members of the proposed class." (Pet.App. 83a.)

32 This was contrary to Rule 23(c)(1), which requires that a district court rule on class status "[a]s soon as practicable after the commencement of an action brought as a class action." If the district court had ruled on the class motion before it announced its decision on the merits, and denied class status because of overinclusiveness of the class proposed in the complaint, it is obvious that we would have proposed a narrower class, as we have done in the district court following remand.

court did not believe that Rule 23 applied. Thus, there is no occasion in this case for the Court to consider whether district courts may continue to exercise their discretion to "define those subclasses proper to prosecute an action without being bound by the plaintiff's complaint." Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 184-85 (1974) (Douglas, J., dissenting in part). Nor, as we show below, is there any occasion for the Court to require that the unnamed members of the putative class start this litigation anew in the district court.

B. THE UNNAMED MEMBERS OF THE PUTATIVE CLASS NEED NOT COMMENCE THIS ACTION ANEW IN THE DISTRICT COURT

This is the second case to challenge the federal parole guidelines because they seek to apply unlawful Youth Correction Act release policies to adult offenders. See Part IIC(i) below. This first action had been brought as a non-class "test case," see Katz v. Carte Blanche, 496 F.2d 757, 758 (3d Cir. 1974) (en banc), and became moot with the release from custody of the named plaintiffs.[33] This action is the successor to the "test

33 Cale v. Attorney General, No. 75-1822, D.D.C., appeal dismissed as moot, 515 F.2d 416 (D.C. Cir. 1976) (table). Respondent had unsuccessfully sought to participate in Cale by seeking to be added as an additional plaintiff in the district court under Rule 20 of the Federal Rules of Civil Procedure, and by

footnote continued

case,"[34] and -- as stated in the "Motion to Certify Class" (App. 17) -- was brought as a class suit "to insure that the issues in this case, which are capable of repetition, will not evade review."

Notwithstanding our repeated requests for class certification -- requests which commenced with the filing of the complaint (App. 17) -- the district court refused to allow the case to be maintained as a class action, and respondent was released from custody before the court of appeals could reverse the district court's

requesting that the court of appeals consolidate his appeal from the subsequent denial of the Rule 20 motion with the then pending interlocutory appeal in Cale, and by then -- after that application was denied -- by seeking to intervene in Cale in the court of appeals. This final attempt to participate in Cale was also unsuccessful; the appeal from the denial of rthe Civil Rule 20 motion was voluntarily dismissed after the commencement of this action.

34 This case was filed in the same district, and before the same judge to whom Cale v. Attorney General, supra, had been assigned. The relationship between the two cases was shown by respondent's request for interim relief (App. 19), which was "based on evidentiary material and memorandum filed in the related case of Cale v. Attorney General, Civil Action No. 75-1822." (Id.) No ruling was ever made on this motion, or on the companion motion for an expedited hearing. (App. 18.) Respondent's attempt to remedy this inaction by resort to a writ of mandamus was unsuccessful. In re Geraghty, No. 76-1975, D.C. Cr., mandamus denied without opinion, November 16, 1976.

adverse class determination.[35] Although respondent has continued to represent the interests of the unnamed members of the putative class irrespective of the status of his personal claim, and notwithstanding the fact that unnamed members of the putative class have sought to individually participate in this case,[36] petitioners argue

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35 Although there is no dispute that respondent's personal claim has been extinguished, we disagree with petitioners' contention (Pet.Br. 21-23) that respondent's personal claim became moot when he was mandatorily released from prison on June 30, 1977. Pursuant to 18 U.S.C. §4164, respondent served the remaining eight months of his sentence "as if released on parole," and until respondent completely satisfied his sentence, the district court had the power to fashion relief, e.g., to require that the time "as if released on parole" be reduced or eliminated.

36 The Court plainly has jurisdiction to allow unnamed members of the putative class to be substituted as respondents or, alternatively, to intervene. Mullaney v. Anderson, 342 U.S. 415, 417 (1952); Rogers v. Paul, 382 U.S. 198 (1965). Because intervention was sought before the decision of the court of appeals had reached a final adjudication, intervention is timely. United Air Lines, Inc. v. McDonald, supra, 432 U.S. at 395. n.16.

Petitioners' argument to the contrary (Pet. Br. 42-43) is based upon cases where intervention was sought after a case had reached a final adjudication, Black v. Central Motor Lines, 500 F.2d 407 (4th Cir. 1974) (intervention sought one year after entry of consent decree), Clover v. Collins, 177 F.2d 234 (7th Cir. 1949), or where

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intervention was sought to create subject matter jurisdiction, Schmoll Fils, Inc. v. The Fernglen, 85F.Supp. 578 (S.D.N.Y. 1949), or to establish venue, Levenson v. Little, 75 F.Supp 575 (S.D.N.Y. 1948), or where a motion to substitute parties was made after expiration of the the then two year time limit of Civil Rule 25, Hofheimer v. McIntee, 179 F.2d 789 (7th Cir. 1949).

The only relevant case cited by petitioners is Becton v. Green County Board of Education, 32 F.R.D. 220 (E.D.N.C. 1963), a case brought before the 1966 amendments to Rule 23 on behalf of six school schildren to challenge a segregated public school. Intervention was sought by other school children after the named plaintiffs had graduated, moved, or dropped out, and was denied as untimely, 32 F.R.D. at 223, and, alternatively, on the theory urged here by petitioners, id. at 222-23. But as the Court of Appeals for the Second Circuit later held, the better view is to allow intervention in the circumstances of Becton, in the interests of judicial economy when, as here, the intervenors could file a new action raising the same claims already at issue. Ruller v. Volk, 351 F.2d 323, 328 (2d Cir. 1965). Accord, Miller & Miller Auctioneers v. G.W. Murphy Ind. Inc., 472 F.2d 893, 895-96 (10th Cir. 11973); Healy v. Edwards, 363 F.Supp. 1110, 1112-13 (E.D.La. 1973) (3 judge court), vacated on other 421 U.S. 772 (1975).

Nor is there any merit to petitioners' argument (Pet.Br. 41 n. 30) that addition of a prisoner incarcerated at a federal correctional institution in North Carolina would create unnecessary "practical problems." The same guidelines are used uniformly throughout the country, and as the court of appeals correctly concluded (Pet.App. 28a), claims at issue

footnote continued

that yet another suit must be brought, i.e., that the decision of the court of appeals reversing the district court's adverse class determination is a nullity because respondent's personal claim was extinguished before the appeal could be decided, and the case certified as a class action on remand.

It is obvious that considerations of judicial economy do not support petitioners' claim of mootness. Nor, as we show below, are petitioners' arguments supported by the case or controversy requirement of Article III.

1. The Continuing Functional Adversity

The parole board continues to apply the policies challenged in this case in the ten thousand or so release decisions it makes each year,[37] and acknowledges (Pet. Br. 52 n. 41) that it will abandon those nationwide

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in this case do not turn on the nuances of individual facts. In addition, the record in this case shows that the "practical problems" alluded to by petitioners -- the difficulty in communication between a prisoner and counsel who practices in a different area, Starnes v. McGuire, 512 F.2d 918, 929-30 (D.C. Cir. 1974) (en banc) are illusory: The affidavit filed in the district court by Mr. Gillis, the prospective additional respondent incarcerated in North Carolina, shows that he has spoken with respondent's principal attorney at the North Carolina correctional facility.

37 See note 8 supra.

policies if this Court affirms the decision of the court of appeals. Thus, there can be no question about the "continuing existence of a live and acute controversy," Steffel v. Thompson, 415 U.S. 452, 459 (1974) (emphasis in original), with respect to the legality of the federal parole guidelines. Nor can it be said that the putative plaintiff class "lack[s] a legally cognizable interest in the outcome." Powell v. McCormack, 395 U.S. 486, 496 (1969). If, on remand, the district court concludes that the case may be maintained as a class actions, its final decision will "include and describe those whom the court finds to be members of the class." Federal Rule of Civil Procedure 23(c)(3). The unnamed members of the putative class therefore continue to have "a personal stake in the outcome of this case." Baker v. Carr, 369 U.S. 186, 204 (1962).

As the court of appeals observed (Pet.App. 27a), respondent's attorneys are vigorously representing the interests of the unnamed members of the class, several of whom, acting through respondent's attorneys, have sought to individually participate in these proceedings, both in the district court, the court of appeals, and in this Court. Even though the personal claims of many of these prospective additional named plaintiffs have also been extinguished by the passage of time,[38] it can be

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38 The evanescent nature of any individual challenge to the legality of the parole guidelines is shown by

"safely assume[d] that [counsel for respondent have] other clients with a continuing live interest in the case." Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975). Under these circumtances, there is a live controversy between adverse parties, satisfying the case or controversy requirement of Article III.

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the extinction or impending extinction of the personal claims of the prospective additional respondents-petitioning -intervenors.

Harry Cardillo was mandatorily released under 18 U.S.C. §3164 on July 3, 1979, after his attempt to gain relief through an individual habeas corpus proceeding was unsuccessful. Cardillo v. United States Parole Commission, No. 77-874, M.D.Pa., Mem.Op., July 17, 1978, aff'd without opinion, No. 78-2363, 3d Cir., March 6, 1979, certiorari pending No. 78-6620.

James Rust was mandatorily released on April 23, 1979; his individual habeas corpus proceeding was dismissed as moot on May 12, 1979, Rust v. Warden, No. 78-945, M.D.Pas. David Gillis and James Taylor are due for imminent release -- Gillis will soon be mandatorily released, and Taylor has a "presumptive parole" date in December of 1980. Millard V. Hubbard started to serve his ten year federal sentence on January 3, 1979, following a successful habeas corpus challenge to his state court conviction. Hubbard was re-tried and acquitted of the state charges, and is presently seeking resentencing on his federal conviction pursuant to United States v. Tucker, 404 U.S. 443 (1972)

2. Petitioners' Sterile Claim of Mootness

Notwithstanding the continued functional adversity presented in this case, petitioners seek to argue that the unnamed members of the putative class must commence this litigation anew. (Pet.Br. 42.) As do the petitioners in Fidelity National Bank v. Roper, No. 78-904, petitioners here seek to extract from prior decisions of this Court the proposition that unless an individual litigant's claim is "so inherently transitory" (Pet.Br. 35), a case that is incorrectly refused class certification becomes moot whenever the personal claim of the class representative is extinguished before the adverse class determination can be corrected on appeal.

The primary flaw in petitioners' mootness theory is that it imparts jurisdictional substance to a Rule 23 class certification order. But as the Court recently noted, "it is axiomatic that the Federal Rules of Civil Procedure do not create or withdraw federal jurisdiction." Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978). And as amicus points out,[39] class "certification" and class "denial" are not based upon Article III, but are concepts adopted in the 1966 amendments to the Federal Rules of Civil Procedure.

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39 Brief Amicus Curiae of National Clients Council, Inc., et al. at 14-15.

A second defect in petitioners' mootness theory is that it is contrary to the Court's holding in United Air Lines, Inc. v. McDonald, 432 U.S. 385 (1977), that class plaintiffs can pursue appellate review of adverse class determinations after satisfaction of their individual claims. Id. at 393 n. 15. Petitioners' attempt to distinguish McDonald (Pet.Br. 37-39) is factually in error. In McDonald, the personal claims of the original plaintiffs had been fully satisfied, see note 17 supra, and the Court nonetheless held that the original plaintiffs could prosecute an appeal from the final decision to challenge the adverse class determination. Also, as petitioners admit (Pet.Br. 40 n.29), their theory of mootness would render meaningless the Court's recent decisions in Coopers & Lynbrand v. Livesay, 437 U.S. 463 (1978), and Gardner v. Westinghouse, 437 U.S. 478 (1978).

i. A Lack of Certifiability

It is therefore not surprising that petitioners' mootness theory is without support in the decisions of the Court upon which they would rely. For example, petitioners cite Board of School Commissioners v. Jacobs, 420 U.S. 128 (1975), Pasadena City Board of Education v. Spangler, 427 U.S. 430 (1976), and Weinstein v. Bradford, 423 U.S. 147 (1975), as setting out the broad rule that a case must have been duly certified as a class

action if it is to survive the extinction of the personal claim of the class representative. (Pet.Br. 27-28.) But unlike the present case, none of these cases was "certifiable" when it reached this Court.

In Jacobs, six high school students had complained of a denial of their First Amendment rights in the distribution and publication of a school newspaper. Although the case had been brought as a classs action, the district court's final judgment did not describe "those whom the court finds to be members of the class," as required by Rule 23(c)(3). The named plaintiffs, who had purported to act on behalf of a class, made no complaint on appeal of the district court's failure to have entered judgment in favor of anyone other than the named parties. The result was that the only parties before the Court were the defendants and the original plaintiffs, all of whom had graduated from high school, and none of whom would ever again run afoul of the challenged practices. The case was therefore moot.

Similarly, in Pasadena City Board of Education v. Spangler, supra, while the case had been brought as a class suit, "there had been no certification of any such class which is or was represented by a named party to this litigation." 427 U.S. at 430. As in Jacobs, the original plaintiffs nad not complained on appeal of the district court's failure to have allowed the case to be maintained as a class action, and could therefore not appear in this Court to assert the interests of the unnamed members of the class.

Finally, in Weinstein v. Bradford, supra, a challenge to state parole procedures had been brought as a class action, but the district court had refused to so certify it and denied relief on the merits. On the prisoner's appeal, the court of appeals reversed and remanded on the merits, making no mention of the class issue. 519 F.2d 728 (4th Cir. 1975). After the state parole officials had successfully petitioned for a writ of certiorari, 421 U.S. 991 (1975), the original class representative suggested to this Court that the entire case had become moot when he was unconditionally discharged from custody. In that setting, where the original class representative had acquiesced in the district court's adverse class determination and was himself the proponent of the suggestion of mootness, the Court was left without a live controversy between adverse parties and had no alternative but to deem the case to be moot. 423 U.S. at 149.

Unlike the prisoner in Weinstein v. Bradford, respondent here has not acquiesced in an adverse class determination. Nor has he abandoned representation of the interests of the unnamed members of the putative class, as did the plaintiffs in Jacobs and Spangler when they did not complain on appeal of the district court's failure to have included unnamed members of the class in its final decision. On the contrary, respondent has litigated this case from the very outset on behalf of the putative class, and because the case is still "certifiable,"

i.e., that there has not been a final adjudication that the case may not be maintained as a class action, and judgment may still be entered in favor of the unnamed members of the putative class, respondent may continue to represent their interests.

In contrast to petitioners' mistaken reliance upon Franks v. Bowman, 424 U.S. 747 (1976) as supporting their claim that class certification is the sine qua non of the class representatives right to represent the unnamed members of the class after his (or her) personal claim has been extinguished, the Court's careful analysis of the mootness question in that case, and its subsequent decision in Memphis Light Gas & Water Div. v. Craft, 436 U.S. 1 (1978), supports our view that, as the court of appeals observed (Pet.App. 2la n.43), it is "certifiability" and not "certification" that allows the class suit to continue irrespective of the status of the personal claim of the original class representative.

In Franks, an employment discrimination case had been duly certified as a class action on behalf of several subclasses. Before the case was decided by this Court, the sole representative of one of the sub-classes had been lawfully discharged from employment, and had obtained a judgment for his personal back pay claim. As do petitioners here, the company in Franks argued that the case was moot because the original class representative had no personal stake in the outcome of the continuing controversy between the company and the

unnamed members of the class about back pay and seniority benefits. 424 U.S. at 752-53.

In rejecting this claim of mootness, the Court did not rely solely on the fact that the case had been dely certified as a class action. Instead, the Court focused on the question of whether "a live controversy [remains] at the time this Court reviews the case,'" id. at 755, quoting Sosna v. Iowa, 419 U.S. 393, 402 (1975), and held that because the case had been duly certified as a class action, the unnamed members of the class would be entitled to relief and therefore possessed a personal stake in the outcome of the case. Id. at 755-57.

That the same analysis would apply to a case which could still be certified as a class action, i.e., that the unnamed members of a putative class continue to possess a personal stake in the outcome of a case brought as a class action as long as it is "certifiable" --is shown by the Court's analysis of the mootness question in Memphis Light Gas and Water Div. v. Craft, supra. That case had been brought as a class action to obtain declaratory and injunctive relief, and money damages for the named plaintiffs. The district court refused to allow the case to proceed as a class action, and denied relief on the merits. The court of appeals affirmed the denial of class certification,[40] but reversed on the merits of the

40 In Craft, the court of appeals had upheld the denial of class certification on the ground that class

footnote continued

individual claim. Although the defendants successfully petitioned for a writ of certiorari, 429 U.S. 1090 (1977), the putative class representative did not cross-petition for review of the adverse class determination. In addressing the threshold question of mootness, 436 U.S. at 7-9, the Court made clear that it would have relied upon the continuing dispute between the defendants and the unnamed members of the putative class in resolving the mootness issue if the court of appeals had reversed the district court's adverse class determination. Id. at 8.

None of the cases cited by petitioners bear upon the context in which the mootness question is presented in this case -- where the case is still "certifiable," and where there is a continuing controversy between the defendants and the unnamed members of the putative

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status was unnecessary because any relief granted would "accrue to the benefit of others similarly situated." 534 F.2d at 686. The prime authority cited for this proposition was the decision of ther Eighth Circuit in Ihrke v. Northern States Power Co., 459 F.2d 566, 572, a decision vacated as moot by this Court, 409 U.S. 815 (1972).

Even if Rule 23 required that a class action be "necessary," a requirement properly rejected by the court of appeals in this case (Pet.App. 28a), the fate of the class claims in Craft and Ihrke shows that class status is, in fact, "necessary" whenever there is a possibiilty that the personal claim of the original class representative will be extinguished before the merits of the class claims will be finally adjudicated.

class. Nor is there any merit in petitioners' argument that a decision by the district court on remand that the case should be maintained as a class action will not "relate back" to the time when that order should have been entered -- "as soon as practicable after commencement of the action," Rule 23(c)(1), a time when respondent concededly had a live personal claim.

ii. Relation Back

The "relation back" doctrine is firmly rooted in the common law. See the ancient authorities collected in United States v. Loughrey, 172 U.S. 206, 225-30 (1898). (White, J., dissenting). The doctrine is a "fiction of law adopted by the courts solely for the purpose of justice," Gibson v. Chouteau, 18 Wall. (80 U.S.) 92, 101 (1872), and has been applied to situations where delay is "not attributable to the laches of the parties," Mitchell v. Overman, 103 U.S. 62, 64 (1888), but where "it is the duty of the court to see that the parties did not suffer by the delay." Id.

If a legal fiction is needed to assuage the "case or controversy" requirement, the relation back principle is applicable to cases where, as here, a class representative diligently seeks an order allowing a case to be

maintained as a class action,* but because of the district court's error, the case cannot be maintained as a class action without appellate review. Petitioners, though, would limit application of the relation back principle to cases where any individual's claim "is so inherently transitory." (Pet.Br. 35.) While this claimed limitation on the relation back principle does not square with the narrow reading of Article III urged by petitioners,[41] it is nonetheless met in this case.

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* It is for this reason that petitioners' reliance upon Vun Cannon v. Breed, 565 F.2d 1096 (9th Cir. 1977) (Pet..Br. 30) is misplaced. There, the class representative had not moved for class certification before his personal claim became moot, and the question explicitly reserved was "what effect, if any, action by the district court frustrating an attempt by the representative plaintiff to obtain class certification prior to the time his claim is mooted might have on the jurisdictional issue." Id. at 1101 n. 7. Compare Jones v. Califano, 576 F.2d 12, 22 (2d Cir. 1978) (relation back appropriate when class representative had moved for class certification prior to extinction of individual claim). In this case, the motion for class certification was filed with the complaint. (App. 1.)

41 If, as petitioners argue (Pet.Br. 25-26), the extinction of the personal claim of a class representative before a case has been certified as a class action irrevocably deprives an Article III court of jurisdiction over an otherwise continuing controversy, there is no reason why jurisdiction may be resorted to for policy reasons (Pet.Br. 35-36) by the fiction of relation back.

The interest of most federal prisoners in challenging the legality of the federal parole guidelines is temporary in nature, as shown by the extinction, or impending extinction, of the personal claims of the prospective additional respondents.[42] While there might be enough time for a district court to rule on a request that a case be maintained as a class action -- especially when, as in this case, the request is made at the same time the lawsuit is filed -- the evanescent nature of individual claims does not provide enough time for there to be effective appellate review of an adverse class determination, Roe v. Wade, 410 U.S. 113, 125 (1973), and for many prisoners a challenge to the legality of the parole guidelines is "one that is distinctly 'capable of repetition, yet evading review.'" Gerstein v. Pugh, 420 U.S. 103, 110 n. 11 (1975). Under these circumstances, a decision by the district court on remand that the case may be maintined as a class action will "relate back" to the time when that order shjould have been of the action." Federal Rule of Civil Procedure 23(c)(1). See Swisher v. Brady, 438 U.S. 204, 213 n.11 (1978); Bell v. Wolfish, ___ U.S. ___, ___ n.5 (No. 77-1829, May 14, 1979, slip op. 4 n.5.)

Even if the interest of most federal prisoners in challenging the legality of the federal parole guidelines

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42 See note 38 supra.

was not "so inherently transitory," petitioners' limitation on the relation back doctrine would still be in error. That the individual claims in Gerstein v. Pugh, supra, Swisher v. Brady, supra, and Levi v. Wolfish, supra, were of the sort which would be extinguished before the district court "can reasonably be expected to rule on a certification motion," Sosna v. Iowa, 419 U.S. 393 402 n. 11 (1975), does not answer the question presented here, where the district court -- through no fault of respondent -- first failed to heed the admonition of Rule 23(c)(1), and then did not apply the proper standards to our promptly filed request that the case be maintained as a class action. Contrary to petitioners' arguments, the relation back doctrine is fully applicable in these circumstances. See, e.g., Esplin v. Hirschi, 402 F.2d 94, 101 n.14 (10th Cir. 1968); Jimenez v. Weinberger, 523 F.2d 689, 696 (7th Cir. 1975) (Stevens, J.); Ahrens v. Thomas, 570 F.2d 286, 289 (8th Cir. 1978); Knable v. Wilson, 570 F.2d 957, 964 n.46 (D.C. Cir. 1977); Jones v. Califano, 576 F.2d 12, 22 (2d Cir. 1978).

Petitioners' mootness arguments are without substance, and can be intended only to "foster repetitive and time-consuming litigation," Craig v. Boren, 429 U.S. 190, 194 (1976), and to "postpone indefinitely relief which under the law may already be long overdue." Franks v. Bowman, 424 U.S. at 757 n. 9. As we show below, the parole board has been applying its unlawful release policies for the last six years, and the time has come to

correct the board's usurpation of judicial sentencing powers.

II. THE MULTI-FACETED ILLEGALITY OF THE FEDERAL PAROLE GUIDELINES

Subsumed within questions three and four of the Petition for Writ of Certiorari is the central question of this case --did the court of appeals correctly reverse the district court's grant of summary judgment upholding the legality of the federal parole guidelines, both on their face and as applied, and remand the case for trial on respondent's detailed factual allegations concerning the genesis and application of those guidelines?[43]

The rules for reviewing summary judgment decisions are familar -- the Court must view the record in the light most favorable to respondent, the party who opposed the grant of summary judgment in the district court, United States v. Diebold, 369 U.S. 654, 655 (1962), and accept our version of the facts, Bishop v. Wood, 426 U.S. 341, 347 (1976), rather than the unfavorable factual

43 There is no dispute that the board's present guidelines, 44 Fed.Reg. 26542-48 (May 4, 1979) are, with differences not relevant to this case, the same guidelines applied to respondent in 1976, and the same guidelines originally promulgated by the board in 1972. See Pet.Br. 58.

representations offered by petitioners.[44]

Our challenge to the legality of the guidelines in the courts below started with those guidelines and a detailed explanation of how that "incredible table"[45] of "customary ranges of imprisonment," unrelated to the sentence actually imposed, was created. As we show below, those guidelines when first adopted in 1973 implemented a radical change in parole release decisionmaking, transforming the parole release decision into a second, unauthorized sentencing decision.[46] After

44 The decisions of the lower federal courts which have upheld the legality of the guidelines, e.g., Rifai v. United States Parole Commission, 586 F.2d 695 (9th Cir. 1978), are all based upon what we show below is a mistaken view of the genesis and application of the guidelines.

45 United States v. Norcombe, 375 F.Supp. 270, 274 n.3 (D.D.C. 1974).

46 We disagree with petitioners' assertion (Pet.Br. 57 n.50) that the origin of the guidelines is irrelevant hear. See Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 267-68 (1977). Our summary of the genesis of the guidelines shows that they were predicated upon a mistaken view of federal sentencing practices, an error which was later ignored by the board in its attempt to justify its guidelines. This background , of course, is germane to the question of whether Congress ratified the board's guidelines in the PCRA, and bears upon petitioners repeated and erroneous claim that the guideilnes are based upon parole release criteria adopted in the PCRA.

a brief analysis of the historical concept of the use of guidelines for parole release decisionmaking (infra at 53-56), we discuss the mechanical fashion in which the board applies its guidelines to resentence. (Infra at 57-62.) Then, we turn to the federal parole statutes, to demonstrate that the guidelines were unlawful when adopted (infra at 84-89), and that Congress refused to adopt the board's revolutionary change in parole philosophy in the 1976 PCRA. (Infra at 90-102.) In addition, a brief analysis of the constitutional problems which would be present if the PCRA was construed to authorize the present guidelines (infra at 102-105), dispels any doubts that the present guidelines are contrary to those intended by Congress. Finally, although the ex post facto issue — whether the parole policies authorized by the PCRA enhance the severity of sentences imposed for offenses committed prior to the effective date of the Act--need not be addressed if the board's present policies are unlawful, we demonstrate (infra at 111-116) that even if the guidelines are consistent with the PCRA, they nonetheless require that individuals serve more time in prison before being paroled than they would have in the past, and the guidelines are therefore a constitutionally impermissible ex post facto enhancement of punishment for persons like respondent, who are sentenced for wrongdoing committed prior to to the effective date of the PCRA.

A. The Historical Concept of Parole Guidelines

There is nothing novel about the use of guidelines in parole release decisionmaking. Following scholarly debate about the feasibility of guidlines in 1923,[47] a set of guidelines was created and applied in the Illinois prison system. See Burgess, Factors Determining Success or Failure on Parole in Bruce, The Workings of the Indeterminate Sentence Law in Illinois (1928). The goal of these early guidelines was to aid the paroling authorities in predicting "parole prognosis," i.e., "to serve as a possible model for parole boards in determining which men to release on parole, and in obtaining some true conception of the probable length of parole supervision needed in different cases." Glueck & Glueck, 500 Criminal Careers 286 (1930).

Subsequent "explorations of methodological refinement" in parole guidelines, see Lejins, Parole Prediction —An Introductory Statement, 8 Crime & Delin. 209, 214 (1962), left unchanged the underlying philosophy of parole guidelines — "to increase the number of paroles granted to offenders who are likely to succeed on parole and correspondingly to reduce the number granted to those who are likely to fail." Ohlin, Selection for Parole 39

47 Warner, Factors Determining Parole from the Massachusetts Reformatory, 14 J.Crim.L. & Crim. 172 (1923); Hornell, Predicting Parole Success, 14 J.Crim.L. & Crim. 405 (1923).

(1951).[48] For many years, however, the actual use of parole guidelines was limited. Many parole boards were of the opinion that "no single device which social scientists may contrive can adequately supplant the mature and considered judgment of the parole board members." Ohlin, supra at 69.[49]

The social scientists who created the federal parole guidelines were aware of what they described as a problem of "research utilization," and addressed the problem of "how the product should be modified (or how it should be packaged) in order to meet the perceived needs of practicioners and be put to use." Hoffman, Gottfredson, Wilkins & Pasela, The Operational Use of an Experience Table, 1 (NCCD Supp. Rep. No. 7, 1973). The result was a "product" called the "matrix model" of guidelines.

The "matrix model" of parole guidelines is based on the assumption that a prisoner may be released on parole at any time within the discretion of the parole board,

48 See also Glaser, Prediction Tables as Accounting Devices for Judges and Parole Board, 8 Crime & Delinquency 239 (1962); Hussey, Perspectives on Parole Decision-Making with Juveniles, 13 Criminology 449, 455 (1976).

49 See also Evjen, Current Thinking on Parole Prediction Tables, 8 Crime & Delinquency 215 (1962); England, Some Dangers in Parole Prediction, 8 Crime & Delinquency 265 (1962); Hayner, Why Do Parole Boards Lag in the Use of Prediction Scores, 1 Pac. Soc. Rev. 72 (1958).

i.e., that there are no minimum sentences.[50] This assumption is in error as applied to federal prisoners, 77% of whom must serve one-third of their sentences before becoming eligible for parole.[51]

Notwithstanding the inapplicability of the "matrix model" to federal prisoners, it was successfully "packaged" on the erroneous claim -- repeated by petitioners in this Court (Pet.Br. 55-58, 88 n.77) -- that the matrix merely quantified the board's unregulated

50 As the creators of the guidelines mistakenly believed,

> [W]hen minimum sentences are short or are not given (as is presently a sentencing trend) parole selection is, in reality, more of a deferred sentencing decision (a decision of when to release) than a parole/no parole decision. Hoffman & Gottfredson, Paroling Policy Guidelines: A Matter of Equity 3 (NCCD Supp. Rep. No. 9, 1973),

51 In fiscal year 1974, 77% of all prisoners sentenced as adults received "regular adult sentences" and were therefore required to serve one-third of the actual sentence imposed before becoming eligible for parole. Administrative Office of the United States Courts, Federal Offenders in the United States District Courts-1974, App. X4 (92) (1978) (9,085 regular adult sentences, 2,498 indeterminate, and 285 mixed).

practices, i.e., that the matrix merely made explicit what had formerly been implicit in the way in which the board made decisions on a case by case basis in the past. Putting aside the fundamental problems inherent in the "descriptive approach" to the creation of guidelines,[52] the result of application of the matrix to federal parole policies was a revolutionary and unlawful change in the way in which the board made decisions.

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52 Descriptive guidelines are intended to make explicit the policies actually controlling discretionary decisions, and thereby insure that the same criteria will be applied in future decisions. The underlying assumption is that unregulated decisionmaking has produced a fair result in the average case, and that guidelines are required to minimize the number of cases in which something other than the "average" decision is made. See generally Gottfredson, Wilkins & Hoffman, Guidelines for Parole and Sentencing (1978). This assumption has been criticized as "untenable," Singer, In favor of "Presumptive Sentences" Set by a Sentencing Commission, 24 Crime & Delinquency 401, 418 (1978), and may well result in greater unfairness than unregulated decisionmaking. See Flaxman, Hidden Dangers of Sentencing Guidelines, 7 Hofstra L.Rev. 259 (1979).

B. Application of the Guidelines

Under the board's present practice, most prisoners receive a parole hearing within 120 days of the start of their term of imprisonment.[53] It is obvious that this parole hearing cannot be concerned with "[t]he behavior record of an inmate during confinement." Greenholtz v. Inmates, ___ U.S. ___, ___ (No. 78-201, May 29, 1979, slip op. 12.) Instead, this initial parole hearing involves, in effect, resentencing the prisoner in accordance with the "customary ranges of imprisonment" set in the board's guidelines.[54]

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53 28 C.F.R. §2.12(a) provides for an initial parole hearing within 120 days of incarceration, which for most prisoners will result in the setting of a "presumptive reease date (either by parole or by mandatory release)." 28 C.F.R. §2.12(c).

54 The concept of providing a prisoner with an early indication of when he (or she) will be paroled has been advanced as a device to enhance rehabilation and prison performance, by making the presumptive parole date conditioned upon institutional program participation and in-prison behavior. See Morris, The Future of Imprisonment 43-44 (1974) (discussing and criticizing systems of "contract parole").

The initial parole hearing, and the presumptive release date set by the federal parole board, however, are independent of prison performance.

The present federal parole guidelines, 44 Fed.Reg. 26543-47 (May 4, 1979) consist of a seven level "offense severity scale"[55] and a four level "salient factor scale."[56] These two scales are combined to form a

55 The original guidelines employed a six level severity scale. See 40 Fed.Reg. 41334 (1975). The present seven level scale was adopted in 1977 by dividing the "greatest" severity level into "Greatest I" and "Greatest II." 42 Fed.Reg. 52399 (1977).

56 The "salient factor score," while intended to be a measure of "parole prognosis," i.e., the likelihood that a prisoner will successfully complete a parole term, remains constant from the time of sentencing.

A prisoner's salient factor score can range from zero to eleven, and consists of points relating to prior convictions, prior incarcerations, age at first commitment, whether present offense involves auto theft or forgery or larceny, whether parole has been revoked, history of heroin or opiate dependence, and employment or full-time school attendance for at least six months during the last two years prior to incarceration. In the present guidelines, a maximum of one point may be awarded for four factors, two points for two factors, and three points for one factor. See 28 C.F.R. §2.20.

The salient factor scale is divided into four levels: scores of nine through eleven are "very good," scores of six through eight are "good," a score of four or five is "good," and scores of zero to three are "poor." Using the board's data, reported in

footnote continued

matrix of 28 "customary ranges of time to be served," which is the period of time that a prisoner with a particular "offense severity rating" and "salient factor score" must serve before he (or she) will ordinarily be paroled.[57] As petitioners admit (Pet.Br. 52n.41), the actual length of sentence is nowhere considered in the guidelines, and if a prisoner's sentence is too short to allow him (or her) to be in prison long enough to serve the "customary range of imprisonment" set by the guidelines, parole will ordinarily be denied, and the prisoner "continued to expiration," a fate which befalls 27% of all convicted defendants sentenced to terms of

Hoffman & Beck, Salient Factor Score Validation -- A 1972 Release Cohort 7 (U.S. Board of Parole Research Unit Rep. No. 8, 1975), the weighted average of the probability that a prisoner will perform satisfactorily upon release for each of the four salient factor scores ranges is as follows:

Rating	Weighted Percent Favorable Outcome
very good (9-11)	95.3%
good(6-8)	83.7%
fair (4-5)	69.5%
poor (0-3)	57.0%

57 The overwhelming number of parole release decisions are in accord with the "customary range of imprisonment" set in the guidelines. See note 6, supra.

imprisonment."[58]

The "customary range of imprisonment" of the guidelines bears little relationship to punishment actually imposed upon persons convicted of federal offenses. Approximately half of all persons convicted of federal offenses are sentenced to terms of probation.[59] For those defendants, of course, the "customary range of imprisonment" is zero. Slightly more than 25% of those defendants who are sentenced to terms of imprisonment receive sentences which are too short to allow them to serve the "customary range of imprisonment," and another 25% have lengthy sentences which do not allow them to become eligible for parole until after they have served their "customary range of imprisonment."[60]

A prisoner's "customary range of imprisonment" is primarily determined by his (or her) rating on the "offense severity scale," a ranking of federal offenses

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58 See note 7 supra.

59 See note 5 supra.

60 Id.

into severity levels ranging from "low" to "greatest II."[61] As the court of appeals noted (Pet.App. 52a n. 115), this arrangement of severity levels does not correspond to the maximum punishments authorized for various offenses by Congress. On the contrary, the "offense severity levels" are the board's attempt to fashion its own criminal code,[62] based upon a theory of "fixed price"

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61 The only contribution of the "salient factor scale" is to increase the "customary range of imprisonment" for a particular "offense severity level." For example, a prisoner with a "very good" salient factor score of 11 who committed a "very high severity" offense, will have a "customary range of imprisonment" of 24 to 36 months. Another prisoner, who had committed the same offense, and who may have received the same (or even a shorter) sentence, but whose salient factor score is "very poor" will have a "customary range of imprisonment" of 60 to 72 months. This will be true even if the offense of conviction carried a five year maximum sentence.

62 That slightly more than 26% of all prisoners are denied parole because the board has concluded that their sentences are too short, see note 7 supra, shows that it is not mere "hyperbole" (Pet.Br. 74 n.65) to characterize the guidelines as a "redrafting [of] the penalty provisions of the United States Criminal code." This is especially true when, as in some cases, parole is denied because the "customary range of imprisonment" set by the guidelines would require the prisoner to serve more time in prison than permissible under the maximum penalty authorized by Congress for the offense of conviction.

sentencing, i.e., "that each crime category be assigned a 'presumptive sentence' -- that is, a specific penalty based on the crime's characteristic seriousness." von Hirsch, Doing Justice 99 (1976).[63]

As the board explained at 44 Fed.Reg. 26548-50 (May 4, 1979) in connection with its addition of 28 C.F.R. §2.19(c), a prisoner's "offense severity rating" is determined by the board's de novo assessment of "total offense behavior." This may include uncharged offenses, Narvaiz v. Day, 444 F.Supp. 36 (W.D. Okla 1977), charges dismissed as part of a plea bargain, Bistram v. United States Board of Parole, 535 F.2d 329, 330 (5th Cir. 1976), or convictions reversed on grounds other than insufficiency of the evidence. United States v. Rubin, 591 F.2d 278, 281 (5th Cir. 1979).

The factors omitted from the board's definition of "total offense behavior" are "attribution judgments"[64] -- to what extent was this defendant responsible for this act, and to what extent does this act reflect a disposition to engage in crime -- judgments which could mitigate or aggravate the gravity of the offense in a particular case.

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63 See also Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment (1976).

64 See, e.g., Rossi, Waite, Bose & Berk, The Seriousness of Crimes: Normative Structures and Individual Differences, 39 Am.Soc.Rev. 224 (1974).

For example, a high ranking police officer who is involved in a conspiracy to commit extortion may be viewed as more culpable, and requiring greater punishment, than a patrolman who was involved in the same unlawful conspiracy. A district judge who had heard all of the facts and circumstances of the offense, and who has heard evidence in aggravation and mitigation of sentence, may well decide to impose disparate sentences in such a situation, as was done in the criminal case giving rise to respondent's conviction.[65] But to the parole board, in its peculiar view of "total offense behavior," each police officer would be viewed as having committed an offense of identical severity.[66]

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65 Respondent was one of nineteen former police officers convicted of involvement in a conspiracy to commit extortion; disparate sentences ranging from eighteen months to six years were imposed by the trial judge, and these intentional disparities were upheld on appeal. United States v/ Braasch, 505 F.2d 139, 152 (7th Cir. 1974). To the parole board, though, each of these defendants had committed an offense of the same severity, and each was considered for parole under the then applicable 26 to 36 months of the guidelines for prisoners who had committed an offense of "very high severity" and who had "very high" salient factor scores.

66 The same result would be achieved in a system of "fixed price" sentencing. See Von Hirsch, Doing Justice 100 (1976).

That the "offense severity scale" is viewed by the board as its own criminal code is illlustrated by the parole hearing of prospective additional respondent Harry Cardillo.[67] Cardillo was serving a four year prison sentence for a violation of 18 U.S.C. §371, and was mandatorily released under 18 U.S.C. §4164 after approximately 33 months of imprisonment. Under the guidelines, however, the "customary range of imprisonment" for Cardillo was 36 to 48 months, in excess of the the time he would serve before mandatory release, and a length of time which is seemingly contrary to the five year maximum penalty authorized by Congress for violations of 18 U.S.C. §371, and at odds with Cardillo's statutory eligibility for parole no later than after he served one-third of his sentence.

At his parole hearing, Cardillo argued that the "customary length of imprisonment" was excessive for his sentence and for his offense of conviction. (App. A1.) The board's hearing officers[68] acknowledged that the

67 The transcript of Cardillos' parole hearing is contained in the appendix to his pending Petition for Writ of Certiorari, Cardillo v. United States Parole Commission, No. 78-6620, and is reproduced in the addendum to this brief as Appendix A.

68 Since 1973, federal parole hearings have been conducted by hearing examiners. See 38 Fed.Reg. 23311 (1973) (order of the Attorney General authorizing the board to delegate decision-making authority to hearing examiners).

same "customary range of imprisonment" would apply if Cardillo had received a one year sentence (App. A2), and expressed the board's view that the "customary ranges of imprisonment" of the guidelines "are there to establish accountability" (App. A1), and that the only question at issue at the hearing was whether a decision should be made to "go below the guidelines." (App. A2.) Parole was denied because the examiners "can find no reason to depart from the guidelines." (App. A4.)

That the views of the sentencing judge are afforded little, if any weight, in the decision to "go below the guidelines" is shown by the circumstances surrounding the denials of parole to Eliezer Becher, who sought to intervene in the district court, and to David Gillis, a prospective additional respondent in this Court. Becher received a five year sentence upon his plea of guilty to a violation of 21 U.S.C. §960. (App., Ct. of App. A66.) Notwithstanding the attempt of the sentencing judge "to fulfill a moral obligation of [his] office"[69] by advising the board of his intent "that the defendant not serve more than one-third of the sentence," (App., Ct. of App. A70),

69 Becher v. United States, No. 77 Civ 2084 (HFW), S.D.N.Y. May 2, 1977 (filed as an exhibit to Becher's Application for Relief pending Final Disposition of Appeal in the court of appeals, denied on July 15, 1979).

Becher was denied parole because he had not served the "customary range of imprisonment" set for him by the guidelines." (Id. at A68.)

David Gillis initially received a five year sentence, and because of his cooperation with the government, was awarded a "presumptive release date"[70] to come after 24 months of imprisonment. Thereafter, the sentencing judge, acting on a timely motion under Rule 35 of the Federal Rules of Criminal Procedure, reduced Gillis' sentence to three years. Upon reconsideration, the board determined that "no change" should be made in the presumptive release date, thereby effectively negating the reduction in sentence -- Gillis will be paroled one month before he would be mandatorily released under his reduced sentence.[71]

As the Chairman of the board recently represented to the House Judiciary Committee, the board views itself as "a small collegial body, devoting full time to the specialized task of attempting to set fair and equitable prison terms within the statutes and the limits set by the

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70 See note 53 supra.

71 These facts are alleged in the Motion to Substitute, filed in this Court, and are supported by evidentiary material appended to the similar motion filed in the district court.

sentencing court."[72] In this Court, though petitioners contend (Pet.Br. 59) that the board's power to grant parole irrespective of the "customary ranges of imprisonment" set by the guidelines means that it is not attempting to resentence convicted felons. This is incorrect.

The power to grant parole outside of the guidelines is sparingly used. In fiscal year 1977, only 6.6% of all parole release decisions were below the guidelines. See note 6 supra. The board's own study of its decisions to depart from the guidelines shows that in only 9 out of 1080 cases was a decision made to grant or to deny parole irrespective of the guidlines because of factors relating to offense severity. Hoffman & DeGostin, Parole Decision-Making: Structuring Discretion 10-11 (U.S. Board of Parole Research Unit Rep. No. 5, 1974).

In addition, the board's internal practices are designed to minimize the number of decisions to depart from the guidelines. At the hearing held in the district court on remand before proceedings were stayed following the grant of certiorari, James C. Neagles, the board's

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72 Hearings on the Dept. of Justice Appropriation before the House Comm. on the Judiciary, Ser. No. 27, 95th Cong., 2d Sess., 101 (1978) (testimony of Cecil C. McCall, Chairman, United States Parole Commission).

chief hearing officer, revealed that the board maintains statistics on the number of cases in which each of its hearing examiners has voted to make a decision outside of the guidelines. The board periodically holds meetings with all of the hearing examiners to review these statistics, a practice which is plainly intended to minimize the number of decisions made to depart from the guidelines. For all of these reasons, the board's power to depart from the guidelines in a particular case is entitled to no more deference than the power to depart from discriminatory height requirements in Dothard v. Rawlinson, 433 U.S. 321, 331 n.13 (1977).

Petitioners seek to justify the board's refusal to consider length of sentence as a factor in the parole release decision because parole under the PCRA is to have "the practical effect of balancing differences in sentencing policies between judges and courts." H.Conf.Rep. 94-383, 94th Cong., 2d Sess. 19 (1976). (Pet.Br. 66-70.) Although based on an erroneous view of the PCRA, see Part II(c)Iii) below, petitioners' argument disregards the manner in which the present system of resentencing by the parole board came about -- through an attempt to apply Youth Correction Act release policies to adult prisoners.

C. Creation of the Guidelines

i. The YCA Study

The present federal parole guidelines are the product of a study of decisionmaking in Youth Correction Act,[73] cases conducted in 1971 and 1972 by the board in cooperation with the National Council on Crime and Delinquency.[74] See Hoffman, Paroling Policy Feedback, 7-8 (NCCD Supp.Rep. No. 8, 1973).[75] YCA commitments

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73 18 U.S.C. §§5005-5026.

74 As the former chairman of the parole board has stated, the guidelines were developed "by the National Couincil on Crime and Delinquency in cooperation with the U.S. Board of Parole. The project was codirected by Dr. Don M. Gottfredson, Director, Research Center, National Council on Crime and Delinquency, in Davis, California. His codirector was Professor Leslie Wilkins of the State University of New York in Albany." Reed, Parole vs. The Determinate Sentence in the Administration of Criminal Justice, 1975 Proceedings of the Congress of Correction of the American Correctional Association 259, 263 (1975)

75 In its "Return and Answer" (App. 25), petitioners admitted the allegation of paragraph 30 of the complaint (App. 11), that Hoffman, supra, is one of the reports describing the creation of the guidelines.

are purely indeterminate -- the YCA prisoner may be released at any time within the discretion of the board -- and it is for that reason that length of sentence was not considered in the YCA study. Id. at 10.

The YCA study was intended to test the hypothesis that decisions in YCA cases were based on four factors -- offense severity, parole prognosis, institutional program participation, and institutional discipline. Hoffman, supra at 12.[76] The study consisted of asking members of the Youth Corrections Division of the board to complete forms rating these four factors in a total of 340 YCA cases heard from November 1, 1971 to May 30, 1972. Id. at 7. The results from 275 of these cases, id. at 8 n.6, were then tabulated and analyzed. Id. at 12-16.

The conclusion of the YCA study was that the ratings of institutional program participation and institutional discipline were insignificant factors in decisionmaking. Hoffman, supra at 16. The most significant factor in determining how long a YCA

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76 These factors were chosen after "[i]nformal interviews with parole board members and hearing examiners," Hoffman, supra at 5, and were intended "to reflect four important prevalent parole selection concerns cited by [two commentators]." Id. at 10. These factors, though, were chosen without regard to the rehabilitative purpose of YCA commitments.

prisoner would remain incarcerated was found to be the rating of offense severity, followed by the rating of parole prognosis. Id. From these findings, the board's researchers concluded that the majority of YCA release decisions could be predicted on the basis of the severity of the prisoner's offense and upon a judgment of the likelihood that, if paroled, the prisoner could successfully complete a parole term. Id. at 14.

There were obvious methodological problems with this study -- no attempt was made to determine if the study itself had affected decisionmaking,[77] only a small number of cases were involved, and the subjective scales used were relatively crude.[78] Notwithstanding these problems, the board decided to base its prospective decisionmaking -- not only in YCA cases, but in cases dealing with adult offenders -- on the results of the study. This was a radical shift in the focus of the study, which had been intended merely to allow "parole board

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77 See Aronson & Carlsmith, Experimentation in Social Psychology 61-70, in Lindzey & Aronson, II The Handbook of Social Psychology (1968).

78 Based upon information we have obtained through the Freedom of Information Act from the Law Enforcement Assistance Administration, which provided the funds for the NCCD study creating the guidelines, we believe that the evidence will show that these were the criticisms of the NCCD study by an outside reviewer.

members to examine the congruence of actual [YCA policy] with desired [YCA] policy on a macroscopic level." Hoffman, supra at 26. Thus, the modest goal of the study was to allow the board to determine if its YCA policies were consistent with those authorized by Congress. If this had been done, it is apparent that the board would have realized that its YCA policies were unlawful.[79] Instead, the board decided that the policies revealed in the YCA study should be reified into a set of guidelines for adult as well as for youthful offenders. Hoffman, supra at 27.

Petitioners do not deny that the board's current guidelines for adult offenders are based upon the board's former YCA policies (Pet.Br. 57 n. 50), but assert that it

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79 The central purpose of the YCA is that "execution of the sentence is to fit the person, not the crime for which he was convicted." Dorszynski v. United States, 418 U.S. 424, 434 (1974). For this reason, a number of courts have held the board's guidelines to be unlawful as applied to YCA prisoners. See, e.g, United States ex rel. Mayer v. Sigler, 403 F.Supp. 1243 (M.D.Pa. 1975), aff'd without published opinion, 556 F.2d 570 (3d Cir. 1977); Fletcher v. Levi, 425 F.Supp. 918 (D.D.C 1976); DePeralta v. Garrison, 575 F.2d 749 (9th Cir. 1978); Duldulao v. United States Parole Commission, 461 F.Supp. 1138 (D.Fla. 1978). As one district judge recently concluded, the board "has refused to accept and implement the fundamental philosophical concept of the YCA." Watts v. Hadden, Warden, 469 F.Supp. 223, 230 (D.Colo. 1979).

was appropriate for the board to establish its release policies in adult cases by studying how it made decisions in YCA cases. Id. There is no logic in this assertion. Aside from the Congressional mandate that commitment under the YCA is for rehabilitation, Dorszynski v. United States, 418 U.S. 424, 434 (1974), there is a vast difference between release decisions in YCA cases and release decisions in cases involving adult offenders. Unlike a YCA offender, who is eligible for release immediately upon imprisonment, 18 U.S.C. §5017(a), and will generally be confined for an indeterminate period of up to six years, 18 U.S.C. §5017(c), adult offenders may receive any sentence up to the maximum authorized by statute, * and approximately three-quarters of all adult offenders must serve one-third of their sentence before becoming eligible for parole.[80]

Had the board studied its policies in cases involving adult prisoners before adopting what it claims here (Pet.Br. 57-58) were intended to be "descriptive guidelines," see note 52 supra, it is obvious that a well designed study would have shown that length of sentence and percentage of total served were controlling factors

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* See, e.g., Blockburger v. United States, 284 U.S. 299 (1932); Townsend v. Burke, 334 U.S. 736 (1948); Gore v. United States, 357 U.S. 386 (1958); United States v. Grayson, 438 U.S. 41 (1978).

80 See note 51 supra.

in the parole release decision. This is precisely the finding of an independent researcher, who studied the board's decisions, using the board's pre-1973 data, and found that the factors most predictive of actual decisionmaking were time served, length of sentence, and custody classification at the time of the parole hearing. Schmidt, Demystifying Parole 62 (1976).

Application of the board's YCA policies to adult offenders produces anomalous results. It is, of course, impossible that the board was releasing adult prisoners before they became eligible for parole, or that the board was granting parole after the prisoner had fully served the sentence imposed by the district judge. This, however, is precisely what is "predicted" by the YCA policies as applied to adult prisoners. The YCA policies "predict" that 25% of all prisoners will be paroled only after they have been mandatorily released, and that another 25% will be paroled before they even become eligible for parole.[81]

The obvious irrelevance of the board's YCA experience to parole decisions for adult prisoners -- who are sentenced by a judge and who must serve a substantial portion of their sentence before becoming eligible for parole -- was apparent to state parole boards when the same researchers who had created the federal

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81 See note 7 supra.

parole guidelines attempted to "package" those guidelines for use by state systems. In North Carolina, where -- as with adult prisoners in the federal system -- most prisoners must serve a significant portion of their sentence before becoming eligible for parole, the state parole board refused to adopt the federal YCA guideline model, concluding that it was not their responsibility to "resentence the inmate." Gottfredson, Cosgrove, Wilkins, Wallerstein & Rauh, Classification for Parole Decision Policy 38 (1978). For the same reasons, the YCA policy model was rejected by the parole boards in Virginia, Louisiana, and Missouri. Id. at 31.[82]

In this Court, the board seeks to argue (Pet.Br. 63-70) that Congress ratified the YCA model of parole release decisionmaking for adult prisoners in the PCRA. But before responding to petitioners' erroneous construction of the PCRA, we briefly discuss the new parole release policies created by the manner in which the subjective measures of offense severity and parole prognosis of the YCA study were transformed into the "offense severity scale" and "salient factor scale" of the present guidelines.

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82 Guidelines created for those jurisdictions are "sequential models," which attempt to isolate each of the judgments made in the parole release decision, and insure that decisions are made rationally. See Gottfredson, et al., supra at 277.

ii. Mechanical Measures

As we have shown above, the results of the YCA study were poorly suited for application to prisoners serving regular adult sentences. But even if the board could lawfully have applied its YCA policies to adult offenders, the rating of the severity of a prospective parolee's offense and the subjective judgment of his or her parole prognosis made in the YCA study bear no relation to the "offense severity" and "salient factor" scales of the present guidelines. Instead, the mechanical measures created for offense severity and parole prognosis resulted in the creation of new parole release policies, which had not been derived from the YCA study, and which have not been authorized by Congress.

The judgment of offense severity made by the board members participating in the YCA study was analogous to the decision of a judge in imposing sentence. Just as a judge has the discretion to impose any sentence within statutory limits, the board members involved in the YCA study were free to assign whatever severity rating they deemed appropriate, regardless of

the type of offense involved.[83] Similarly, the rating of parole prognosis used in the YCA study was an ad hoc decision based on the facts and circumstances of each case -- what is the likelihood that this prisoner, released at this time, will be able to successfully complete a parole term?[84]

The board's researchers recognized that these subjective measures "may reflect rationalizations for decisions rather than determinants of them." Hoffman, supra at 11. But rather than inquire further and determine what factors were actually material to decisionmaking in adult cases, the board's researchers --

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83 At the conclusion of each YCA hearing in the study, the board members were asked to circle one of six descriptions of offense severity, ranging from "among the least serious offenses" to "among the most serious offenses." Hoffman, supra at 28. The only direction for determining the severity rating was to "circle the letter which most clearly corresponds to your evaluation of the severity of the offense behavior for which this subject was committed." Id.

84 The rating of parole prognosis was made at the end of each hearing by circling, on a scale ranging from zero to 100, in increments of 10, the probability of a favorable parole outcome. Hoffman, supra at 29.

apparently because of budgetary limitations[85]--disregarded the objections of their "Scientific Advisory Board,"[86] and accepted without objection the request of the board "to develop parole selection policy guidelines in as objective a format as possible." Hoffman & Gottfredson, Paroling Policy Guidelines: A Matter of Equity 8 (NCCD Supp.Rep. No. 9, 1973).[86] The resulting "objective measures" bear no relation to the judgments of offense severity and parole prognosis made in the YCA study.

As the court of appeals observed (Pet.App. 34a), petitioners have admitted that the "objective measure" of offense severity created for the guidelines was obtained by distributing sets of index cards, each card containing the name of an offense, to members of the board, who were asked to sort the cards into six piles of

85 Based upon FOIA materials, see note 78 supra, we believe that the evidence will show that the board's researchers sought additional funds from the LEAA to analyze the applicability of the YCA policy to adult cases, but that the LEAA refused to grant additional funds, being of the view that such a project should be supported by the board.

86 The board's researchers periodically consulted with a "Scientific Advisory Board." Based on the FOIA materials, see note 78 supra, we believe that the evidence will show that the "Scientific Advisory Board" opposed as methodologically unsound application of the YCA policies to adult prisoners.

varying severity levels. While this sorting of index cards may have been useful to ascertain the board's consensus about the severity of the 51 offense descriptions involved in the exercise, it sheds no light upon the multiple factors which had been considered in the ad hoc judgment of offense severity made in the YCA study.[87]

The "objective measure" of parole prognosis created for the guidelines is even less related to the rehabilitative judgment made in the YCA study, where a decision to deny release because of poor parole prognosis could have been based on the belief that additional incarceration was required before the prisoner would be

87 In the opinion of Professor Levy, whose affidavit was offered by respondent in the district court (App., Ct. of App. A23-A28), there would be two major consequences from the change in rating the severity of an individual offense, as in the YCA study, to rating the severity of a category of offense, as in the offense severity scale:

> First, it is likely that severity judgments for categories of offenses will be more likely to reflect ideological attitudes towards the offense than would ratings based on actual knowledge about a particular offense. Such a procedure would tend to reproduce the raters stereotypes towards the various offenses, instead of a reasoned judgment about the offender's behavior. Secondly, the present method of assessment of offense severity underestimates the importance of the offender's actual behavior, by disregarding this factor from the rating of the severity of the offense. Id. at A27-A28.

rehabilitated.[88] In contrast with the subjective judgment in the YCA study of whether, after a given amount of imprisonment, a particular prisoner has been rehabiliitated, a prisoner's salient factor score is constant, regardless of whether a prisoner has been confined for one day or for twenty years.

The salient factor scale was created from an analysis of the impact of sixty-six factors upon the post-release behavior of federal prisoners who had been discharged from custody during the first six months of 1970. Gottfredson, Wilkins & Hoffman, Guidelines for Parole and Sentencing 41 (1978). In determining which factors to count, the researchers apparently concluded that success following release from prison could not be affected by anything that occurred during imprisonment, and those factors -- such as institutional behavior, program participation, and case worker recommendations -- were totally omitted from the factors considered. It was therefore inevitable that the salient factor scale does not include any measures of in-prison performance, and is unaffected by how long a prisoner has been incarcerated, and his (or her) success in prison.

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88 This, of course, would have been consistent with the "treatment" rationale of the YCA. See note 79 supra..

While petitioners claim that institutional performance "may justify a decision outside of the guidelines" (Pet.Br. 59), the board's statistics indicate that in only 17 out of 1080 cases is a decision made to parole below the guidelines because of "outstanding institutional progress." Hoffman & DeGostin, Parole Decision-Making: Structuring Discretion 11 (U.S. Board of Parole Research Unit Report Five, 1974). As the board's Guideline Application Manual makes plain, a departure from the guidelines because of program achievement "is clearly exceptional." Id. at 4.17.

Once the board's researchers had created the offense severity scale and the salient factor scale, the next step was to define the "customary ranges of imprisonment" of the guidelines. The actual sentences which had been imposed "deliberately were not taken into account."[89] Instead, the board's researchers calculated the median length of time which had been served in prior years for each cell of the matrix. Hoffman & Gottfredson, Paroline Policy Guidelines: A Matter of Equity 10 (NCCD Parole Decisionmaking Project Supp.Rep. No. 9, 1973). A concededly arbitrary

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89 Hearings on Dept. of Justice Authorization before the House Judiciary Comm., Ser. No. 27, 95th Cong., 2d Sess., 122 (1978) (testimony of Peter Hoffman, Director of Research, United States Parole Commission).

"discretion range" was then added to the median to obtain the range of total time, as in the present guidelines. Id.

The result of this process was, as the board's researchers admitted, the creation of a new "prospective policy" for parole release decisionmaking. Hoffman & Beck, Application of a Severity Scale 27 (NCCD Supp.Rep. No. 13, 1973), in which parole boards would "act as sentencing review bodies" to determine "the time convicted offenders should serve in prison." Wilkins, Additional Views, in Von Hirsch, Doing Justice 178-79 (1976). While the board's researchers believed this "revolutionary philosophy," id., was lawful because "parole selection is, in reality, more of a deferred sentencing decision (a decision of when to release) than a parole/no parole decision," Hoffman & Gottfredson, supra, at 3, this view of federal parole law was incorrect in 1973, and remains erroneous today, following enactment of the PCRA.

D. The Illegality of the Guidelines

Three revolutionary policy changes are implemented by the federal paroleguidelines: First, rehabilitation is no longer considered in the parole release decision.[90] Second, offense severity is mechanically rated de novo by the board, without regard to the facts of the particular case and irrespective of the actual sentence imposed, or the maximum sentence which could have been imposed.[91] Third, a prisoner can do nothing once he is incarcerated to improve his chances for parole. Congress, however, has not authorized any of these revolutionary changes.

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90 As we have shown above, rehabilitation is not a factor in the guidelines because the board's researchers simply decided not to include any factors bearing on rehabilitation when they created the salient factor score.

91 The board has attempted to justify this policy as being essential to "the primary benefit of the Board's guidelines, which is to reduce sentence disparity." 40 Fed.Reg. 41328, 41330 (1975). Reduction of sentence disparity, though, was not a consideration in the YCA study, where all sentences are pure indeterminate, and, as we have shown above, reduction of sentence disparity is at best an after the fact rationalization for the guidelines "packaged" for the board.

i. Pre-PCRA Law

Rehabilitation, the facts and circumstances of the particular crime, the actual sentence, and the behavior record of an inmate during confinement have all been part of the federal parole law since Congress enacted the first federal parole statute in the Act of June 25, 1910, ch. 387, §1, 36 Stat. 319.

Parole was at that time a recent innovation, and was a product of the prison reform movement of the late nineteenth century, and the belief that "reformation is the primary object to be aimed at in the administration of penal justice."[92] The first modern parole statute had been adopted in New York in 1876, and was limited in application to a reformatory for youthful offenders.[93] The New York statute, N.Y. Laws 1877,

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92 Wines, Prison Reform 13 (1910), quoted in LaRoe, Parole with Honor 55 (1939). See also Lindsey, Historical Sketch of the Indeterminate Sentence and Parole System, 16 J.Crim. & Crim. 9, 10-18 (1925); 4 Attorney General's Survey of Release Procedures 16-19 (1939).

93 "The year 1876 marked the beginning of parole in America, inasmuch as, for the first time in this country, parole was used at Elmira in a manner comparable to present day parole administration." 4 Attorney General's Survey of Release Procedures 19 (1939).

ch.424, viewed parole 'as the culmination of the course of varied institutional training programs, whereby the inmate's capacity and willingness to reform could be tested by serving a part of the sentence in the community on parole."[94] In pertinent part, the statute provided that a prisoner could be paroled if

> there is a strong and reasonable probability that any prisoner will live and remain at liberty without violating the law, and that his release is not incompatible with the welfare of society.

Virtually identical language was used by Congress in the 1910 parole act, which authorized the release of a prisoner on parole if

> there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society. 36 Stat. 319 (1910).

That rehabilitation and the behavior record of an inmate during confinement were viewed in the 1910 Act as the primary focii of the parole release decision is

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94 Reed, Parole vs. TheIndeterminate Sentence in the Administration of Criminal Justice, 1975 Proceedings of the Congress of Correction of the American Correctional Association 259, 260.

reflected in the decision of Congress to make parole available only to prisoners who were serving a sentence of one year or more, and who had served one-third of their sentence. As the then Superintendent of Federal Prisons and Prisoners testified before the House Judiciary Committee, "reformation is built up step by step, evidenced by certain marks and credits in the institution in which the prisoner is confined," and "it is not thought that a man could show that he had become reformed within that short period of time [if parole was made available to prisoners serving sentences less than one year]." Hearings on S.870 and H.R. 23016 before Subcomm. of the Comm. on the Judiciary, 61st Cong., 2nd Sess. 5, 8 (1910).

Rehabilitative considerations were again considered by Congress in 1913 when it extended parole to prisoners serving life sentences.[95] Act of January 23, 1913, 37 Stat. 650 (1913). Fifteen years later, the state of the law was aptly summarized by this Court in United

95 Making parole available to a prisoner serving a live sentence was viewed as a mechanism to replace executive clemency for prisoners "whose record prior to conviction was not vicious, and who while in prison have never been reported for any violation of the prison rules." H.Rep. 371, 62nd Cong., 2d Sess., 2 (1912), quoting from the 1911 annual report of the board of parole.

States v. Murray, 275 U.S. 347 (1928), when it wrote that parole is determined by "the conduct of penitentiary convicts during their incarceration." Id. at 357.

The first substantive change in the parole release decision between 1910 and 1976[96] occurred in 1951 when -- continuing to reflect its view that parole was linked to rehabilitation, prison behavior, and the length of sentence -- Congress made parole available to prisoners serving sentences in excess of one-hundred and eighty days. 65 Stat. 277 (1951). In contrast with the one year minimum sentence which had been set in the 1910 Act, the 1951 amendment reflected the judgment of Congress that two months of incarceration (one third of one hundred and eighty days) would be sufficient "before the authorities can determine the degree of rehabilitation that would warrant the parole of a prisoner." S.Rep. 525,

96 In 1930, the original board -- which had consisted of the superintendent of prisons and the warden and physician of each prison -- was replaced by what was intended to be an "independent parole board" to be appointed by the Attorney General. 46 Stat. 272 (1930.) See H.Rep. 104, 71st Cong., 1 (1930). Problems apparently developed with the independence of the board, see Goldfard & Singer, After Conviction 170 (1973) (reporting that the attorney general and the board had yielded to presssure to release former members of the "Capone gang" after they had served their minimum sentences), and in 1950 Congress required that members of the board be appointed by the President, and approved by the Senate. 64 Stat. 1085 (1950).

82nd Cong., 1st Sess., 2 (1951).

In 1958, Congress brought indeterminate sentencing to federal criminal law, 72 Stat. 845-46 (1958), and allowed a district judge to impose a sentence making a prisoner eligible for parole immediately upon imprisonment, or at any time before the prisoner had served one-third of his or her sentence. Indeterminate sentencing was viewed as a rehabilitative tool -- the 1958 Act was intended "to give the Parole Board discretion to determine when a prisoner has reached that point in his rehabilitation process at which he should be released under supervision to begin his readjustment to life in the community." Garafola v. Benson, 505 F.2d 1212, 1217 (7th Cir. 1974).[97]

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97 See also United States v. Salerno, 538 F.2d 1005, 1008 (3d Cir. 1976) (Act "was intended to give district judges a mechanism to adjust the length of a defendant's sentence to his progress in rehabilitation programs and his attitude towards a return to society.")

The claim that the Act was primarily intended to allow the board to correct sentence disparity, advanced by the board in other litigation, see Brief of Petitioner, United States v. Addonizio, O.T. 1978, No. 78-156, 57-58, was correctly rejected by Judge Tone in Garafola, supra: "As for [sentence] disparity, however, Congress must have recognized that [indeterminate sentencing] would have only a modest impact, since its use is optional with the judge and judges who tend to give severe sentences are not the ones most likely to make frequent use of [indeterminate sentencing]." 505 F.2d at 1217.

Federal parole law remained unchanged at the time the guidelines were adopted by the board in 1973. Although the board started to use hearing examiners in 1973, see 38 Fed.Reg. 23311 (1973), the criteria for granting parole had remained virtually unchanged from the seminal New York statute of 1877; in 1973, 18 U.S.C. §4203(a) (1970) provided the following parole release criteria:

> If it appears to the Board of Parole from a report by the proper institutional officers or upon application by a prisoner eligible for release on parole, that there is a reaonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole. (emphasis supplied)

This was the statute in effect at the time the parole guidelines were first adopted. It is plain that the policies implemented in the guidelines, see ante at 83, are contrary to the parole criteria of the 1970 statute, with its emphasis upon rehabilitation. In 1976, though, Congress enacted a new parole statute, 90 Stat. 219-33, and the board argues that its guidelines, which were repromulgated without any substantial changes under the PCRA, 41 Fed.Reg. 19326 (1976), are consistent with the Act. (Pet.Br. 60-74.) Although we believe that the

illegality of the board's guidelines may be determined solely from the language of the PCRA, we first turn to the legislative history of the Act to show that it would be truly absurd for the PCRA to be construed in the manner urged by petitioners. See TVA v. Hill, 437 U.S. 153, 184 n.29 (1978).

ii. The PCRA

The PCRA originated as H.R. 5727,[98] and resulted from "an extensive nationwide review of the problems of

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98 The PCRA was reported from the House Judiciary Committee on May 11, 1975, as HR 5727, accompanied by H.Rep. 94-184, 94th Cong., 1st Sess. (1975). 121 Cong.Rec. 12821 (1975). The bill was considered and passed by the House on May 21, 1975. 121 Cong. Rec. 15716.

The Senate Judiciary Committee reported an amended version of HR 5727 on September 11, 1975, accompanied by S.Rep. 94-184, 94th Cong., 2d Sess. (1976). 121 Cong.Rec. 28615 (1976).

A House-Senate conference committee reported a compromise bill on February 23, 1976 (house) and February 24, 1976 (senate). 122 Cong.Rec. 4063,. 4145. The amended bill passed the Senate on March 2, 1976, 122 Cong.Rec. 4862 and the House on March 3, 1976. 122 Cong.Rec. 5165.

the penal system." H.Rep. 94-184, 94th Cong., 1st Sess. 2 (1975). The House Judiciary Committee was skeptical of the board's guidelines; as its counsel stated at the committee hearings:

> . . . the problem is that once you fall into the trap of accepting any of the Board's justifications for what it does, such as relieving sentence disparity, you sort of have lost the game. This is because they have surrealistic justifications for what they do, and reality compels cutting through whatever they claim they need and looking at the system as a whole. Hearings on H.R. 1598 and Identical Bills before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 93rd Cong., 1st Sess. 182 (1973).

The bill which emerged from the House Judiciary Committee required that a federal prisoner with good institutional behavior was to be released after completion of one-third of his sentence, unless the board affirmatively found release to be undesirable under the statutory criteria. See H.Rep. 94-184, supra at 5. Guidelines were contemplated by the House bill "with respect to the factors to be taken into account in determining whether or not a prisoner should be released on parole." (§4202(a)(1) (House version). The floor debate made clear that the Houes was opposed to the type of guidelines then in use by the board, and that something

less mechanical was intended.[99]

The House bill endorsed rehabilitation as a goal of imprisonment -- section 4208(e) required that if parole was denied, "the examining panel shall advise the prisoner as to what steps, in its opinion, may be taken to correct the problems responsible for the denial of release on parole, so as to enhance the chance of being released." As explained by Representative Drinan, this section meant that "[t]he rehabilitative process is further underscored." 121 Cong.Rec. 15705 (1975).

A new power to alleviate sentence disparity and to reward rehabilitation was created in the House bill. Section 4205(c) would have vested the sentencing court with jurisdiction to act on a motion by the Director of the Bureau of Prisons to modify a prisoner's sentence and make the prisoner immediately eligible for parole if the Director was of the opinion that "by reason of [a prisoner's] training and response to the programs of the Bureau of Prisons . . . there is a reasonable probability that the prisoner will live and remain at liberty without

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99 See the remarks of Rep. Drinan at 121 Cong.Rec. 15703 ("the committee clearly expressed its objection to a checklist or prototype denial statement"); remarks of Rep. Guid, id. at 15710 (bill would produce "far greater scrutiny and understanding of each prisoner's record, both before and during incarceration").

violating any criminal law, that his immediate release is not incompatible with the welfare of society, and that his release would not so deprecate the seriousness of his crime as to undermine respect for law." Id. In addition, the House bill would have made permanent the board's 1974 administrative reorganization into various regions. H.Rep. 94-184, supra at 2.

Substantial changes were made to the House bill by the Senate, which worked closely with the board, S.Rep. 94-369, 94th Cong., 2d Sess. 19 (1976), in preparing a bill which would have ratified the board's existing guidelines. Id. at 18, 25. The Senate bill rejected the presumption of parole contained in the House bill, and would have authorized the board to apply "the standards and criteria [for parole release] . . . without regard to which of the three main sentencing alternatives [regular adult sentence, pure indeterminate sentence under 18 U.S.C. §4208(a)(2) (1970), or a mixed indeterminate sentence under 18 U.S.C. §4208(a)(1) (1970)] is utilized by the court." Id. This, of course, was precisely what the board was doing when it applied its guidelines without regard to the length or type of sentence which had been imposed.

As viewed in the Senate bill, parole was "an extension of the sentencing process." S.Rep. 94-369, supra at 15. And one of the purposes of parole was defined as requiring that "offenders sentenced for similar crimes under similar circumstances will be required to serve comparable periods of incarceration." Id. at 19.

The bill subsequently enacted (the "PCRA"), resulted from what was described by Representative Kastenmeier, one of the sponsors of the House billl, as "considerable compromise on the part of the conferees on both sides." 122 Cong.Rec. 5163 (1976). The presumption of parole at the one-third point was eliminated, and the Senate's characterization of parole as an "extension of the sentencing process" was deleted from the conference report, which, as the court of appeals observed (Pet.App. 42a), contained a statement of purposes otherwise identical to the Senate version. See H.Conf.Rep. 94-383, 94th Cong., 2d Sess. 19-20 (1976). Rather than having the purpose of eliminating sentence disparities, as in the Senate bill, the conference committee described the PCRA as "having the practical effect of balancing differences in sentencing policies between judges and courts." Id. at 19. (emphasis supplied)

As did the House bill, the PCRA made permanent "the legality of changes implemented by administrative reorganization." Conference Rep., supra at 20[100] The

100 Petitioners argue here, as they did in the court of appeals (Pet.App. 43a n.91) that by making permanent the board's 1974 administrative reorganization, the PCRA ratified the board's guidelines. (Pet.Br. 66.) This is a tenuous basis upon which to conclude that Congress was approving the board's radical revision of parole decisionmaking, especially when the language relied upon by petitioners is derived from the House bill which, as petitioners do not deny, would have rejected the existing guidelines.

provision of the Senate bill that indeterminate sentences would be treated as regular adult sentences was omitted from the PCRA.[101]

The major differences between the House and Senate, described by Representative Kastenmeier as revolving about the "question of how much discretion should be retained by the Commission in making parole release determinations once a prisoner is in fact eligible for parole," 122 Cong.Rec. 5163 (1976), was "resolved by increasing the role of parole determination guidelines and by granting the Commission the option of acting outside the guidelines in extraordinary cases." Id. But the conference report carefully avoided ratifying the board's existing guidelines:

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101 The PCRA amended the Youth Corections Act, 18 U.S.C. §5017(a), and the Juvenile Justice Act, 18 U.S.C. §5041, "to provide for parallel parole release criteria for all eligible prisoners." Conference Report, supra at 36, 37. Although this provision has been read as repealing the rehabilitative focus of the YCA, DePeralta v. Garrison, 575 F.2d 749 (9th Cir. 1978), we believe that the correct view is that expressed in Watts v. Hadden, Warden, 469 F.Supp. 223, 233 (D. Colo. 1979), that the ameliorative policies of the YCA (and the JJA) were not repealed by the PCRA.

> It is the intent of the Conferees that the guidelines serve as a national parole policy which seeks to achieve both equity between individual cases and a uniform measure of justice. The Parole Commission shall actively seek the counsel and comment of the corrections and criminal justice communities prior to promulgation of guidelines and shall be cognizant of past criticism of parole decision-making. Conference Report, supra at 26.

The parole release policies contemplated by the PCRA are multi-faceted. The board is required to consider three factors: (1) Whether the prisoner has "substantially observed the rules of the institution or institutions to which he has been confined"; (2) "the nature and circumstances of the offense", and (3) "the history and characteristics of the prisoner." 18 U.S.C. §4206(a) (1976). Based on these three factors, and pursuant to guidelines, the board is to determine "that release would not depreciate the seriousness of [the prisoner's] offense or promote disrespect for law" and "would not jeopardize the public welfare" in making release decisions. Id. Rehabilitation is explicitly maintained as a concern for the board -- the PCRA viewed parole as "providing a means for prisoners to achieve credit for good behavior and shorten their time in prison." 122 Cong.Rec. 4862 (1976) (remarks of Sen. Hruska.) This view is reflected by the adoption in the PCRA of the provision of the House bill that if parole is denied, the prisoner shall be advised, when feasible, "as

to what steps may be taken to enhance his chance of being released at a subsequent proceeding. 18 U.S.C. §4207(g) (1976).

The Conference Report explains the parole release criteria of the PCRA as follows:

> First, it is the intent of the Conferees that the Parole Commission reach a judgment on the institutional behavior of each prospective parolee. It is the view of the Conferees that understanding by the prisoner of the importance of his institutional behavior is crucial to the maintenance of safe and orderly prisons.
>
> Second, it is the intent of the Conferees that the Parole Commission review and consider both the nature and circumstances of the offense and the history and characteristics of the prisoner. It is the view of the Conferees that these two items are most significant in making equitable release determinations and are a viable basis, when considered together, for making other judgments required by this section. Conference Report, supra at 26.

As the court of appeals concluded (Pet.App. 43a), the conferees were of the view that in each case, the parole decision makers

> must weigh the concepts of general and special deterrence, retribution and punishment, all of which are matters of judgment . . . and come up with determinations of what is meant by "would depreciate the seriousness of the offense or promote disrespect for the law" that, to the extent possible, are not inconsistent with findings of other parole decisions. Conference Report, supra at 26.

It is this statutory scheme which petitioners contend authorizes the present form of federal parole guidelines. (Pet.Br. 60-74.) We disagree. The guidelines were unlawful when adopted, and continued to be unlawful under the PCRA.

iii. The Guidelines Are Contrary to the PCRA

There are five important divergencies between the policies implemented in the guidelines and the policies authorized by Congress in the PCRA:

First, Congress intended that the "conduct of penitentiary convicts during their incarceration," United States v. Murray, supra, 275 U.S. at 357, continue to be considered in the parole release decision. Conference Report, supra at 25. Parole release decisions under the guidelines, though, do not weigh any factors relating to institutional behavior, aside from the "general note" that applicability of the guidelines "is predicated upon good institutional conduct and program performance." See 44 Fed.Reg. 26546 (May 4, 1979). The de minimus role of institutional performance in the board's release policies is shown by the small number of cases (17 out of 1080) in which a decision is made to grant parole irrespective of the guidelines because of instituitional behavior, see ante at 81 While the board may have rationalized its decision

to refuse to consider rehabilitative concerns in parole release decisions because "anticipations and hopes for rehabilitation programs have fallen far short of expectations of a generation ago," Greenholtz v. Inmates, supra, slip op. 11, this does not mean that the board may lawfully refuse to consider rehabilitative factors in parole release decisions. This is especially true when, in its report accompanying S. 1437, the proposed revision of the federal criminal code, the Senate Judiciary Committee emphasized that rehabilitation is to remain as a goal of imprisonment. S.Rep. 95-605, 95th Cong., 1st Sess. 891 (1976).

Second, Congress intended that parole release decisions be based "upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner." 18 U.S.C. §4206(a) (1976). The offense severity scale of the guidelines, however, disregards the gravity of the offense in a particular case in favor of a categorization of "offense behaviors." This categorization ignores the factors which would make a given criminal act more or less serious. As we have shown above, the result is that under the guidelines the severity of a prisoner's offense is determined by the type of offense which had been committed, rather than upon the specific criminal act involved. As the court of appeals concluded (Pet.App. 45a), "[s]uch a process seems significantly different from the contemplation of

the conferees that in structuring 'each parole determination [the Commission] shall make a determination as to the relative severity of the prospective parolee's offense.'" (quoting Conference Report, supra at 26) (emphasis added by the court of appeals).

Third, as petitioners admit (Pet. Br.52 n.41) the guidelines refuse to give any weight to the actual sentence imposed. The PCRA, however, does not authorize the board to, in effect, resentence adult prisoners; on the contrary, the PCRA requires the board to be "joined in purpose" with the courts. Conference Report, supra at 26. It is impossible to understand how this may be done if, in making its judgments about the severity of a prospective parolee's offense, the board categorically refuses to consider the sentencing judge's assessment of offense severity, as reflected in the actual sentence imposed.

Fourth, the guidelines do not conform to the requirement of 18 U.S.C. §4206(a)(1976) that parole decisions consider whether release "would not jeopardize the public welfare." Because of the factors which were selected for analysis in the computation of the "salient factor table," a prisoner's "parole prognosis" is the same after one day of imprisonment as it will be after twenty years of incarceration, regardless of institutional program participation or institutional behavior. Such a

measure of "parole prognosis" fails to reflect the Congressional concern of whether release after a given amount of incarceration would "jeopardize the public welfare." See O'Donnell, Churgin & Curtin, Toward a Just and Effective Sentencing System 29 n.30 (1977); cf. Rodriquez v. United States Parole Commission, ___ F.2d ___ (No. 78-2051, 7th Cir., March 20, 1979, slip op. 6) (expressing doubts about legality of board's policy of affording minimal weight to prison behavior but reserving issue).

Fifth, the guidelines treat all prisoners alike, whether they received regular adult sentences, and become eligible for parole after serving one-third of their sentence, or whether they received indeterminate sentences and become eligible for parole either upon imprisonment or at some time, set by the sentencing judge, prior to the one-third point.[102] While this result was intended in the Senate version of the PCRA, it was not incorporated in the PCRA as enacted, and it is plain that the board lacks the power to repeal a statute by administrative fiat.

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102 In its Return and Answer (App. 24), the board admitted the allegation of paragraph 27 of the complaint (App. 10) that a prisoner, like respondent, who was sentenced under then 18 U.S.C. §4208(a)(2) (1970) (reunumbered as 18 U.S.C. §4205(b)(2) in the PCRA) "will be considered as having the same 'customary total time before release' as a person receiving a regular adult sentence."

Petitioners' arguments in favor of the legality of the guidlines are supported by the same "surrealistic justifications" referred to in the House Judiciary Committee hearings. Before responding to these insubstantial arguments, we briefly discuss the constitutional problems which would be present if the present guidelines had been authorized by Congress in the PCRA.

iv. Constitutional Problems with the Guidelines

That Congress did not authorize the type of guidelines used by the board is further shown by application of the "cardinal principle" that a statute will be construed in order to uphold its constitutionality. Lorillard v. Pons, 434 U.S. 575, 577 (1978). As we show below, substantial constitutional problems would arise if the PCRA is construed as authorizing the board's present use of its guidelines.

First, in contrast to the "equity judgment" of parole release before the Court in Greenholtz v. Inmates, ___ U.S. ___ (No. 78-201, May 29, 1979), the parole decision under the federal guidelines is a deferred sentencing decision. The board treats all prisoners as if they had received indeterminate sentences of the same length, and makes the overwhelming number of its parole release decisions by reference to the "customary ranges

of imprisonment" set out in its guidelines, even when the actual sentence is too short or too long to allow the prisoner to become eligible for parole within this "customary range," and without regard to the prisoner's performance while incarcerated. As the court of appeals concluded, such a delegation of the judicial function to an administrative agency would raise serious Article III questions. (Pet.Br. 49a-50a.)[103] See Palmore v. United States, 411 U.S. 389, 407-08 (1973). In addition, if the parole board is to be vested with sentencing powers, more process is due than is provided in the PCRA for the traditional "equity judgment" of parole, which synthesizes "record facts and personal observations filtered through the experience of the decisionmaker and lead[s] to a predictive judgment as to what is best for the individual inmate and for the community." Greenholtz v. Inmates, supra slip op. 6. See Mempa v. Rhay, 389 U.S. 128 (1967).

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103 This is in contrast to the lawful delegation of power in the making or release decisions based on factors determinable only after imposition of sentence. This distinction is overlooked in petitioners' attempt (Pet.Br. 74 n.65) to compare the board's resentencing decisions to the "equity judgments" made in a pure indeterminate sentencing system.

Second, as the court of appeals observed (Pet.App. 51a-53a), if the PCRA is construed as authorizing the offense severity ranking system of the guidelines the lack of standards in the Act for the board's ranking of the severity of offenses would raise substantial questions about the validity of such a delegation of power.[104] That Congress would have set standards for such a delegation of power is shown by the careful attention to this problem in the proposed revision of the federal criminal code, S. 1437. See S.Rep. 95-605, 95th Cong., 1st Sess., 1167-69 (1978).

Third, the guidelines operate to deny serious consideration for parole to those prisoners whose sentences are too short to allow them to serve the

104 For example, in 1976, the severity rating of immigration law violators was increased because of the "Commission's concern with the increasing number of immigration law violators in recent years." 41 Fed.Reg. 37316 (1976). While one commentator has suggested that such changes are "essential if a sentencing commission is to provide the kind of leadership necessary to make sentencing guidelines workable," Singer, In Favor of "Presumptive Sentences Set by a Sentencing Commission, 24 Crime & Delinquency 401, 417 n.20 (1978), the parole board is not a "sentencing commission," and we agree with the observation of the court of appeals (Pet.App. 52a n.114), that [s]uch a judgment appears to be one that is appropriate in the first instance for the Congress."

minimum "customary range of imprisonment" set for them by the guidelines. On this basis, it can fairly be said that prisoners with short sentences are deprived "of "of an interest in liberty on a wholesale basis" contrary to the due process clause of the Fifth Amendment. Hampton v. Mow Sun Wong, 426 U.S. 88, 103 (1976).

These constitutional questions, of course, need not be resolved in this case because, as we have demonstrated above, the board's guidelines are not consistent with the type of guidelines contemplated in the PCRA. Petitioners' arguments to the contrary, which we discuss below, are without substance.

v. Petitioners' Arguments Are Insubstantial

Petitioners' defense of the guidelines starts from the false premise that the criteria of 18 U.S.C. §4206(a) (1976) "form the basis for the guideline system." (Pet.Br. 61.) But as we have demonstrated in Part II(C) above, the basis for the present guidelines is a study of actual decisionmaking in YCA cases, and a number of invalid assumptions made thereafter in the creation of the offense severity scale and the salient factor scale.

From this mistaken premise, petitioners turn to an incorrect view of the legislative history of the PCRA. (Pet.Br. 63-70.) It is simply wrong to assert that "the Senate version of the guideline provision . . . was adopted in [the PCRA]." (Pet.Br. 64.) As we have shown above, both the House bill and the Senate bill would have required the board to act pursuant to some kind of guidelines -- the House bill required explicit guidelines for parole denials, the Senate bill adopted the existing guideline system, and neither version was adopted in the PCRA. Instead, as we have shown above, the guidelines required by the PCRA were to be consistent with the four concerns which have been present in federal parole law for the past 69 years -- institutional behavior, rehabilitation, the nature and circumstances of the particular offense, and the history and characteristics of the prospective parolee.

Nor is there any merit to petitioners' claim that the language in the Joint Explanatory Statement of the Conference Report (Pet.Br. 65-66) -- that the PCRA makes permanent the board's improvements -- was intended to ratify the board's existing guidelines. In 1973, the board conducted a pilot study of decentralization into various regions, which was separate from its cooperation with the National Council on Crime and Delinquency on improved decisionmaking processes.[105] Congress appropriated funds in June, 1974 to carry out the board's decentralization, see H.Rep. 94th Cong., 1st Sess., 2 (1975), and, as the court of appeals correctly held (Pet.App. 43a), these are the reforms which were made permanent in the PCRA, and which are referred to in the portion of the Conference report upon which petitioners rely.

Similarly, there is no basis for petitioners' reference (Pet.Br. 76-77) to the conference report as showing that the board was to make offense severity judgments "independent of the views of individual sentencing judges." On the contrary, the Conference Report at 26 recites that the board "is joined in purpose

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105 This is supported by the submission made by the chairman of the board in 1973 appropriation hearings. See Hearings on Dept. of Justice Appropriations for 1974 before a Subcomm. of the House Comm. on Appropriations, 93rd Cong., 1st Sess., 408 (1973).

with the Courts," and does not vest the board with the independence claimed by petitioners. Also, as we have shown above, the guidelines do not -- as petitioners assert (Pet.Br. 67) --consider "both the nature and circumstances of the offense and the history and characteristics of the prisoner."

Nor does the fact that in the PCRA Congress authorized the board "to moderate the disparities in the sentencing practices of individual judges," United States v. Addonizio, ___ U.S. ___ (No. 78-156, June 4, 1979, slip op. 10) (footnote omitted), mean that Congress intended the board to ignore the actual sentence imposed and resentence inmates. Such a radical change in the meaning of parole would require a clearer expression of Congressional intent than the recognition in the Conference Report that "parole has the practical effect of balancing differences in sentencing policies between judges and courts." Conference Report, supra at 19.

That Congress did not intend the board to be a resentencing agency is further shown by the fact that in 18 U.S.C. §4205(g) (1976) Congress delegated to the Bureau of Prisons -- not the board -- the power to apply to the sentencing judge for a reduction in the minimum sentence to make a prisoner immediately eligible for parole. Thus, the short answer to petitioners' argument that the board's guidelines are the only way in which the board may correct sentence disparity is simply that

Congress did not intend such a heavy emphasis upon resentencing in the parole release decision.

Finally, it is of no consequence that Congress made individual parole decisions immune from review under the Administrative Procedure Act. (Pet.Br. 69-70.)[106] This, of course, did not make the guidelines themselves immune from review, or allow the board to adopt whatever policies it chose, irrespective of those authorized by the PCRA. See TVA v. Hill, 437 U.S. 153, 194 (1978).

Petitioners' defense of the guidelines appears to assume that the only type of guidelines which could be adopted to comply with the PCRA are the "matrix guidelines" used before the PCRA was enacted. (Pet.Br. 62 n.56.) This, however, is plainly wrong, as shown by developments in those states which, in the course of

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106 Contrary to petitioners' arguments (Pet.Br. 13 n.7) all that was intended by Section 4218(d) was to exclude individual parole decisions from review under the APA, without interfering with a prisoner's habeas corpus remedy. As Representative Drinan stated, in explaining this provision of the PCRA, "It may be, for example, that a petition for writ of habeas corpus might lie for certain allegedly unlawful acts of the Commission even if they involve individual parole decisiins. But that is a matter left to the courts and this bill expresses no opinion, one way or the other in that regard." 122 Cong.Rec. 5164 (1976).

adopting parole guidelines, have rejected the "matrix model" in favor of a "sequential model." Those state parole boards concluded -- as the federal parole board should have concluded -- that they are not vested with the power "in effect, to resentence inmates." Gottfredson, Cosgrove, Wilkins, Wallerstein & Rauh, Classification for Parole Decision Policy 38 (1978).

We agree with petitioners (Pet.Br. 52 n.4.) that the proceedings on remand will be a formality -- we expect to have little difficulty in proving the facts discussed above, and thereby establishing that the present guidelines are contrary to the PCRA.

vi. Ex Post Facto Problems

The ex post facto issue is another constitutional question which need not be resolved in this case -- the question of whether the board's guidelines are of ex post facto effect as applied to persons sentenced for offenses committed prior to the effective date of the PCRA will be truly moot if, as we believe will result from this case, the board is required to adopt new guidelines. We will therefore treat the ex post facto issue in summary fashion.

1. Prior to the enactment of the PCRA, district judges would calculate the sentence to be imposed by relying upon the "historical assumption that the Board will give meaningful consideration to a defendant with a good institutional record at the expiration of one-third of his sentence,"[107] and many district judges would ordinarily impose sentence by relying "on the assumption that parole will be accorded at the one-third point."[108] Thus, in 1973, the Chairman of the Administrative

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107 Garcia v. United States Board of Parole, 409 F.Supp. 1230, 1239 (N.D.Ill. 1976), rev'd on other grounds, 557 F.2d 100 (7th Cir. 1977).

108 Newman, Preface to Project, Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810, 812 (1975).

Conference of the United States advised Congress that judges impose sentences in the expectation "that a prisoner who demonstrates his desire for rehabilitation will not serve the maximum term or anything approaching the maximum."[109] More recently, District Judge Lasker testified before the Senate Judiciary Committee that

> Many judges, I have to say, Mr. Chairman, habitually impose long or fairly long sentences in the expectation that a grant of parole will result in the actual time served being much less than originally imposed. Hearings on S. 1437 before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary, 95th Cong., lst Sess., pt. 12, at 8969.

The identical view was expressed by former district judge and then chairman of the Advisory Corrections Council of the Judicial Conference, Harold Tyler:

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109 Hearings on H.R. 1590 and Identical Bills before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 93d Cong., lst Sess., 163-64, 193 (1973) (testimony and statement of Antonin Scalia, Chairman of the Administrative Conference of the United States).

> You know, and I know, as lawyers, that for years we have read in the papers that an offender, John Doe, has been sentenced to 15 years but we know he is not going to serve 15 years. He is going to serve perhaps 5 years.
>
> The public doesn't understand this. We lawyers perhaps do, but I'm not even sure we do all the time. Hearings on S. 1437, supra at 8960.

This understanding of the availability of parole to mitigate a harsh sentence was reflected in a survey of district judges[110] and was acknowledged by the Senate Judiciary Committee in its report accompanying S. 1437, the proposed revision of the federal criminal code:

> A federal judge who today believes that an offender should serve four years in prison may impose a sentence in the vicinity of ten years, knowing that the offender is eligible for parole release after one third of the sentence. S.Rep. 95-605, 95th Cong., lst Sess., at 1169.

These expectations are borne out by an analysis of the board's pre-guideline release decisions for adult prisoners, which shows that the probability of parole was greatest when the prisoner had served between 31 to 50 percent of the total sentence imposed. Schmidt, Demystifying Parole 83 (1976).

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110 See Project, supra, note 108 at 882 n.361 (88% of judges responding to survey stated that they considered likelihood of parole in determining length of sentence to impose).

2. As the court of appeals concluded (Pet.App. 64a-65a), if the board's guidelines require that prisoners serve more time in prison before being paroled than formerly, the guidelines are of constitutionally impermissible ex post facto effect. Accord, Rodriquez v. United States Parole Commission, ___ F.2d ___ (No. 78-2051, 7th Cir., March 20, 1979, slip op. 8-10.) This is precisely what we expect the evidence to show. See Schmidt, supra at 50, concluding from her analysis of the board's pre-guideline statistics that application of the policies adopted in 1973 -- the guidelines -- will require that "individuals will serve more time [in prison before being paroled] than they have in the past."

Petitioners' arguments to the contrary are without merit. First, petitioners assert (Pet.Br. 78) that the guidelines do not "enhance the punishment imposed" because the board has always had the discretion to grant or to deny parole in individual cases as it sees fit. (Pet.Br. 78-84.) The question here, though, is whether the board may, consistent with the ex post facto prohibition, alter its policies to virtually eliminate the possibility of parole for prisoners who received what the board deems to be "lenient sentences," and require that other prisoners serve more time in prison before being paroled than they would have served under prior policies. This would plainly be the imposition of additional

punishment, especially when sentence was imposed with the expectation that the prisoner would be paroled before his (or her) mandatory release date, given good institutional behavior.

Second, petitioners assert (Pet.Br. 84-87) that the guidelines are not the "fairly tight framework to circumscribe the Board's statutorily broad power," Pickus v. United States Board of Parole, 507 F.2d 1107, 1113 (D.C. Cir. 1974), intended in the PCRA. This, however, is a question of fact which, for the reasons discussed above, we expect will be easily resolved in our favor in the district court -- very few prisoners are granted parole before they have served the "customary range of imprisonment" set by the guidelines, and the board has structured its practices to apply the guidelines to resentence convicted felons upon their arrival at prison.

Third, petitioners contend (Pet.Br. 87) that the guidelines cannot be of ex post facto effect because no remedy is possible. This is absurd. If the guidelines are unlawful -- for whatever reason -- the proper remedy will be to require that new and lawful guidelines be promulgated. We presume that the board will thereafter establish some procedure to reconsider parole for those prisoners who were denied release under the unlawful criteria, but these are questions for another day.

As in the court of appeals (see Pet.App. 33a n.67), we have treated the ex post facto issue in summary fashion, not because of the lack of merit to the issue, but because of our belief that the present guidelines are contrary to the PCRA, making it unnecessary to reach the constitutional question. See New York City Transit Authority v. Beazer, ___ U.S. ___ (No. 77-1427, March 21, 1979, slip op. 13 n. 22.)

CONCLUSION

It is therefore respectfully submitted that the judgment of the court of appeals be affirmed.

July, 1979

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APPENDIX

Reproduced from Petition for Writ of Certiorari, Cardillo v. United States Parole Commission, certiorari pending, No. 78-6620

PAROLE TRANSCRIPT OF ONE THIRD HEARING

Time: February 3, 1978
Place: Allenwood, Penn.

[1] Mr. Cardillo, my name is Quirk and this is Mrs. Van Walrick on my left. We are examiners of the Parole Commission, here now to give you a review hearing, a one third review as a matter of fact. Since you've already had your initial hearing. Now basically our procedure is the same. We note that you have no representative that you have elected to proceed without it. We will talk to you for a little while, we will be discussing the case. What we hope to do Mr. Cardillo, is come up with a recommendation, that we come up with for the Commission. Now you know what I say recommendation. We do not make decisions at this level.

Cardillo: Right.

* * *

[5] Quirk: Your sentence only actually calls for 4 years.
Cardillo: The guidelines are supposed to be put me in a range where I can be eligible for parole.

Quirk: The guidelines are there to establish accountability.
Cardillo: Right, accountability according to crimes within the statutory time. I am over the statutory time by 36-48 months.

Quirk: But they are not extending the sentence.
Cardillo: No, no, no, you are not following my point. My guidelines are 36-48 according to you people.

Quirk: What this means, that people who have a Salient Factor score of 6 and an offense behavior of very high would normally be expected to do 36-48 months. That's exactly what it means.

Cardillo: I understand that. The guidelines were taken by taking the medium time of people who served time before. Now, they couldn't have gotten a time limit of 36-48 months, where the mean time could only be 40 months. My whole sentence even if I had gotten the whole sentence, even if I had gotten the full range, could only be 40 months. So they're over my range, I don't have any chance at all at Parole.

Quirk: Yes you do, they have to go below the guidelines. In other words, for accountability and that is what is facing Mrs. V and myself, to give you any kind of favorable decision we have to go below.

Cardillo: Way below, that's pretty hard. Statistics, you know, that's a very hard thing.

[6] Quirk: We have to justify it and the Commission has to justify going below. They also have to justify going above . . . which they can't go above in your case. Your time would be up before you reach the upper level. A matter of fact, your time would be up before you reach the lower level.

Cardillo: That's what I am saying.

Quirk: So, the same thing would apply if you got one year sentence.

Cardillo: I think they have made a mistake. I've researched it all. You don't really know what I am saying. My time could apply to a 15 or 10 year sentence. The most time I could get is 5 years.

Mrs. V: That's right.

Quirk: That's right.

Cardillo: That's the most I could have got by law. The most time I could do by law is 40 months, but the mean time is over that. Now could you come to that think if they took it from people who were in jail. They couldn't have served 40 months.

Quirk: I think you're equating that with sentencing. Which they don't do.

Cardillo: That's how they came to the guidelines. Sir, I don't want to argue with you.

Quirk: No they didn't not [sic] from sentencing.

Cardillo: Yes, but they got them from people who served my type of crime. You are not following me.

Mrs. V: I do but . . .

Quirk: But people with light sentences still have the same guidelines.

Cardillo: Alright, I am not going to argue it. I'll argue it in court. It's an illegal sentence.

Mrs. V: That's where it belongs.

Quirk: That at you point I think you have taken the right approach. Through the court, but the problem is now.

Cardillo: I don't want to get you people mad, that what I done the last time and you people said I wasn't interested in parole. I am more interested than anybody in parole.

Mrs. V: I am not mad.

Quirk: Now, here's the next question. Can you tell us why you think the Commission should go below guidelines. Assume you don't agree with them, but why do you think they should go below the guidelines and [7] release you at this time.

Cardillo: First of all I think that's pretty obvious. I have lots of problems, my wife has been under doctor's care for about 10 years now. It's hard for her, real hard for my young boys. They have no money, no extra money at all. Then again my father just recently about 2 or 3 months ago got another heart attack. They didn't even let me know about. He has been writing and praying I get out, I haven't seen him for 16 months, now there is no way to see him.

* * *

Quirk: Cardillo, Mrs. Van Warkin and I have been talking about it and reviewing the file and find no justification the we [sic] see it that your outside those guidelines for parole. The record would show, that you max out below the guidelines, and because we can find no reason, we recommend that you be

continued to expiration. Now, two things that's a recommendation, it may come back differently, secondly, it has no effect on what you do in court. We are going on the basis of guidelines as we have them now and sentence structure.

Cardillo: Let me ask you a question. What's stopping my parole: Is the time factor in the guidelines.

Quirk: What's stopping? Our recommendation is we don't see the case merits a recommendation below the guidelines, the time factor is what's stopping. What we are saying is basically in effect 33 months seems to be reasonable, on that sentence. OK?

Cardillo: Fine.

Quirk: Good luck to you.

FOR ARGUMENT

No. 78-572

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES PAROLE COMMISSION, ET AL.,
PETITIONERS

v.

JOHN M. GERAGHTY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. a. Respondent contends (Resp. Br. 20) that "[t]here is no dispute that this case presents a live, justiciable controversy between the parole board and the unnamed members of the putative class about the legality of the federal parole guidelines." But that is precisely the point in dispute. To be justiciable under Article III of the Constitution, a suit " 'must be definite and concrete, touching the legal relations of parties having adverse legal interests * * *.' " *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). Federal courts may not exercise jurisdiction in an action "that cannot affect the rights of litigants in the case before them." *Ibid.* As we demonstrated on pages 21 to 23 of our opening brief, respondent's individual challenge to the parole guidelines unquestionably became moot on his release from prison at the end of his term of imprisonment. No other litigant has been recognized as a party plaintiff in this suit, and the case is therefore moot. An attorney's vigor and interest in continuing his

representation is plainly insufficient to establish a constitutional case or controversy. *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 430 (1976).[1]

But respondent (Resp. Br. 36-38) and *amici* (Am. Br. 27-28) argue that the members of the "putative class" have a cognizable "interest" in the outcome of this litigation. We do not doubt that many federal prisoners may be interested in the resolution of the questions raised by respondent's challenge to the parole guidelines. But these individuals are not now parties to the litigation, nor were they parties at the time respondent's claims became moot or at any other time. Because the district court ruled that the case could not proceed as a class action, the "putative class" never "acquired a legal status separate from the interest asserted by [respondent]," *Sosna* v. *Iowa*, 419 U.S. 393, 399 (1975), and thus could not "succeed to the adversary position of [respondent] * * * whose claim [became] moot." *Kremens* v. *Bartley*, 431 U.S. 119, 133 (1977).

Respondent argues (Resp. Br. 39), however, that the existence of an Article III case or controversy cannot depend on whether or not the district court has certified the requested class action pursuant to the procedures of Fed. R. Civ. P. 23. We do not dispute that the Federal Rules of Civil Procedure neither extend nor limit federal jurisdiction. Fed. R. Civ. P. 82. See *Owen Equipment & Erection Co.* v. *Kroger*, 437 U.S. 365, 370 (1978). But our

[1] *Amici* are mistaken in their contention that a constitutional case or controversy is established by an attorney's "vigorous representation of the interests of absentees * * *" (Am. Br. 12). The fact that an attorney vigorously seeks to continue his efforts "cannot alter the fact" that the case is moot. *Hall* v. *Beals*, 396 U.S. 45, 48 (1969). If an attorney's vigor sufficed to create jurisdiction, the case or controversy limitation on federal courts would have no meaning.

mootness analysis does not turn on the specific requirements of Rule 23. It is Article III of the Constitution, not Rule 23, that imposes the jurisdictional "case or controversy" requirement. And, under Article III, there is no case or controversy unless the court has before it an "actual dispute[ ] between adverse parties." *Richardson* v. *Ramirez*, 418 U.S. 24, 36 (1974). Rule 23, like several other rules of civil procedure (*e.g.*, Rule 7 (complaint), Rules 19, 20 and 21 (joinder), Rule 22 (interpleader), Rule 24 (intervention), Rule 25 (substitution)), provides uniform procedures for defining the "adverse parties" before the court and thus in determining whether any litigants, or classes, possess a " 'personal stake in the outcome of the controversy' " that satisfies Article III requirements. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 755 (1976).

Rule 23(c)(1), which was adopted in 1966, provides that the district court shall determine by order whether an action may be brought as a class action. The Rule did not alter the power of the court in this regard but instead made explicit an authority that previously had been implied. See Note, *Proposed Rule 23: Class Actions Reclassified*, 51 Va. L. Rev. 629, 650-651 & n.64 (1965). Before the Rule was adopted, the district courts had to determine whether a case could be brought as a class action, and often they ruled that cases could not proceed as class suits. See, *e.g.*, *Weeks* v. *Bareco Oil Co.*, 125 F. 2d 84 (7th Cir. 1941); *Pelelas* v. *Caterpillar Tractor Co.*, 113 F. 2d 629 (7th Cir.), cert. denied, 311 U.S. 700 (1940); *Clark* v. *Thompson*, 206 F. Supp. 539 (S.D. Miss. 1962), aff'd, 313 F. 2d 637 (5th Cir.), cert. denied, 375 U.S. 951 (1963); *Phillips* v. *Sherman*, 197 F. Supp. 866 (N.D.N.Y. 1961); *Speed* v. *Transamerica Corp.*, 5 F.R.D. 56 (D. Del. 1945); *Pacific Fire Ins. Co.* v. *Reiner*, 45 F. Supp. 703 (E.D. La. 1942). It makes no difference in this case whether the district court denied class treatment under the

pre-1966 practice or under Rule 23(c); the case is moot because, under this Court's consistent rulings, the "putative class" is not an adverse party with a cognizable legal status. See *Sosna* v. *Iowa*, *supra*, 419 U.S. at 399.

This conclusion is supported by the Court's reasoning in *Richardson* v. *Ramirez*, *supra*. In *Richardson*, the California Supreme Court adjudicated a case in which the claims of the individual plaintiffs had expired. Because state courts are not subject to Article III limitations, the California court, unlike a federal court, could "choose to adjudicate [the] controversy simply because of its public importance, and the desirability of a statewide decision." 418 U.S. at 36. Before this Court could exercise jurisdiction over the case, however, it was necessary to determine whether the case presented an "actual dispute[ ] between adverse parties." *Ibid.* The Court concluded that there was no "present dispute" on behalf of the individual claimants in *Richardson* (*ibid.*), but that, because the state court "treated the action as one brought for the benefit of [a] class" (*id.* at 37), the adverse class claims satisfied the case or controversy requirement. *Id.* at 38-40. This was so even though the state's procedures for recognizing class litigants were so disparate from federal procedures that there was "serious doubt" whether the class would have been cognizable as a litigant had the case originated in federal court. *Id.* at 39.[2] Because the class had been

[2] *Amici* mistakenly imply (Am. Br. 25) that the Court held in *Richardson* that the mooting of the named litigants' claims prior to class certification did not moot the case under the case or controversy doctrine. In *Richardson* the class was recognized as a party to the litigation while the case was still pending in the state courts. It was irrelevant for Article III purposes that the state court did not recognize the class as a litigant until after the individuals' claims had expired. For, as the Court held, state courts—unlike federal courts—are not limited by the Article III case or controversy requirement that there be an "actual dispute[] between adverse parties." 418 U.S. at 36. It was only *because* the case was in state, rather than federal, court that the case did not become moot at the expiration of the named litigants' claims prior to class certification. *Ibid.*

recognized as a litigant under the state's procedures before the case reached this Court, the class had "acquired a legal status separate from the interest asserted by [the individual class representative]" (*Sosna* v. *Iowa*, *supra*, 419 U.S. at 399) and thus could "succeed to [an] adverse position" (*Kremens* v. *Bartley*, *supra*, 431 U.S. at 133) when the individual claims became moot. 418 U.S. at 38-40. Accordingly, while Rule 23 and other similar rules of civil procedure are not themselves "jurisdictional," by aligning or excluding parties to the litigation they determine whether the courts have before them "a live dispute between 'live' parties," as Article III requires. *Kremens* v. *Bartley*, *supra*, 431 U.S. at 134 n.15. See *Franks* v. *Bowman Transportation Co.*, *supra*, 424 U.S. at 755.

b. Respondent argues (Resp. Br. 40-46) that even though a class was not certified before his individual claims became moot, the case is not moot because the "putative class" is "certifiable" (see also Pet. App. 21a n.43).[3] As we demonstrated on pages 27 to 30 of our

[3] This case does not, as respondent contends (Resp. Br. 47-48), involve such inherently transitory claims that mootness will inevitably intervene before class certification can occur. See *Sosna* v. *Iowa*, *supra*, 419 U.S. at 402 n.11. As we noted in our opening brief (Br. 33-34), many prisoners serve lengthy periods of imprisonment and may be expected, in an appropriate case, to present challenges likely to endure for sufficient periods to obtain full review of their claims.

Nor is this a case such as that hypothesized by respondents in *Deposit Guaranty National Bank* v. *Roper*, No. 78-904 (to be argued in tandem with this case), where prolonged, "deliberate conduct designed to avoid review" has rendered moot a succession of class action filings by the expedient of paying the individual claims of the class representatives. As we noted in our opening brief (Br. 30-31 n.20), it is possible that in a situation where the class opponent has undertaken a systematic course of paying the claims of individual litigants promptly on the filing of their federal actions, the class certification issue may avoid mootness as an issue capable of

opening brief, however, the "putative classes" in *Board of School Commissioners* v. *Jacobs*, 420 U.S. 128 (1975), and *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424 (1976), were plainly "certifiable" in the district court, but in each case the Court held that the actions were moot because the individual litigants' claims had expired and a "proper class" had not been certified to succeed as an adverse party in the litigation. There being no adverse parties with live claims before the Court, the cases were simply moot.[4]

Jacobs and *Spangler* cannot be distinguished, as respondent suggests (Resp. Br. 41), on the theory that the "certifiability" of the class had not been raised as an issue on appeal in those cases. In both *Jacobs* and *Spangler*, the district court had failed to comply with the formal certification requirements of Rule 23 but nonetheless had

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repetition yet evading review. See *Gerstein* v. *Pugh*, 420 U.S. 103 (1975). But in this case, and in *Roper* as well, there was ample time to rule and the district court did rule on class certification. Moreover, the Parole Commission plainly has not engaged in "deliberate conduct designed to avoid review" by releasing respondent at the expiration of his criminal sentence.

[4]If, as respondent argues (Resp. Br. 41), the question of mootness in this case turns on whether the putative class is certifiable, it is clear that the case is moot. Respondent's individual claims are moot, and there is therefore no individual litigant with a live claim in this case who could serve as class representative for the purpose of certifying the class. See, *e.g.*, *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395, 403 (1977). The "putative class" is thus not certifiable.

Respondent incorrectly relies (Resp. Br. 44) on *Memphis Light, Gas & Water Division* v. *Craft*, 436 U.S. 1 (1978), for the proposition that this case is not moot because the putative class is "certifiable." In *Craft*, the Court held that the claims of two respondents who sought relief in damages satisfied the case or controversy requirement. The Court noted that, because class certification had been denied, "the existence of a continuing 'case or controversy' depends entirely on the [individuals'] claims * * *." *Id.* at 8.

treated the case as a class action and granted class-wide relief. *Jacobs* v. *Board of School Commissioners*, 349 F. Supp. 605, 611-612 (S.D. Ind. 1972); *Spangler* v. *Pasadena City Board of Education*, 311 F. Supp. 501, 505 (C.D. Cal. 1970). Because class-wide relief had been granted, there was no occasion in either case for the question of class "certifibality" to be raised on appeal by the plaintiffs. If the order granting class-wide relief had become final, the plaintiffs would have obtained all the relief they sought. This Court did not suggest that its decision in *Jacobs* or *Spangler* resulted from the plaintiffs' failure to challenge the propriety of the class certification on appeal from judgments in which they had obtained class-wide relief. To the contrary, the Court made clear that those cases were moot because "only a 'properly certified' class * * * may succeed to the adversary position of a named representative whose claim [became] moot."[5] *Kremens* v. *Bartley*, *supra*, 431 U.S. at 133, quoting *Board of School Commissioners* v. *Jacobs*, *supra*.

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[5]Respondent claims (Resp. Br. 21) that this Court's decision in *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977), supports his contention that an individual whose claim is moot has standing to seek review of an adverse class action determination. But as we noted in our opening brief (Br. 37-39), the Court did not address any question of mootness in *McDonald*. Instead, the Court concluded that, on the facts of that case, a settlement that merely implemented a prior judgment on the merits did not preclude the plaintiff from taking an appeal to challenge an adverse class action determination. 432 U.S. at 393 n.14. The Court's conclusion in *McDonald* that the settlement did not foreclose appeal of collateral issues that would in fact amplify her recovery (see *Share* v. *Air Properties G. Inc.*, 538 F. 2d 279, 283 (9th Cir. 1976)) was no doubt aided by the fact that United Airlines conceded that the plaintiff had standing to take the appeal. 432 U.S. at 393. The question whether a prevailing plaintiff has obtained all the relief requested and thus lacks standing to appeal (see 9 *Moore's Federal Practice* para. 203.06, at 716-717 (2d ed. 1975)) is plainly a different inquiry from that presented here—a plaintiff whose claim becomes moot is not entitled to any relief in the federal courts because his claim does not present a case or controversy.

c. Because class certification was denied by the district court and respondent's individual claims have expired, this case is moot. Respondent contends (Resp. Br. 35 n.36), however, that the Court should grant the motion to intervene that has been filed in this Court by five other prisoners. Because this case became moot while it was pending in the court of appeals, however, this Court lacks jurisdiction to grant the motion to intervene. As we noted in our opening brief (Br. 42-43), "intervention may not be allowed to give life to a law suit which does not actually exist * * * [or] breathe new life into an action which [is] no longer justiciable." *Becton* v. *Greene County Board of Education*, 32 F.R.D. 220, 223 (E.D.N.C. 1963).

The cases on which respondent relies (Resp. Br. 35 n. 36) support our contention. For example, in *Fuller* v. *Volk*, 351 F. 2d 323 (3d Cir. 1965), the court observed that "[i]t is well settled that since intervention contemplates an existing suit in a court of competent jurisdiction and because intervention is ancillary to the main cause of action, intervention will not be permitted to breathe life into a 'nonexistent' law suit." *Id.* at 328. Accord, *Miller & Miller Auctioneers* v. *G.W. Murphy Industries, Inc.*, 472 F. 2d 893, 895-896 (10th Cir. 1973).[6] Because this case is moot, the motion to intervene must be denied and the case dismissed. *Duke Power Co.* v. *Greenwood County*, 299 U.S. 259, 267 (1936).

2. Respondent voices numerous criticisms over the manner in which the Commission's parole release guidelines were formulated (Resp. Br. 18-19, 50-82). But the question in this case is not whether these guidelines are the best possible means for ensuring fair and equitable

[6]In *Fuller*, the court held that a motion to intervene may, in the discretion of the district court, be treated as a separate civil action adjudicated independently from the main law suit. In this case too, the action of the intervenors could be instituted by the filing of a separate claim in federal district court. But the filing of that action would not revive the controversy in this case, which became moot upon respondent's release from prison.

parole decisions. The question is, rather, whether the exercise of parole discretion pursuant to the guidelines is unlawful under the Parole Commission and Reorganization Act or the Constitution.

a. Respondent's contention (Resp. Br. 102-105) that the Commission's use of parole guidelines improperly interferes with the judicial sentencing function was rejected by this Court in *United States* v. *Addonizio*, No. 78-156 (June 4, 1979), slip op. 10-11:

> The decision as to when a lawfully sentenced defendant shall actually be released has been committed by Congress, with certain limitations, to the discretion of the Parole Commission. Whether wisely or not, Congress has decided that the Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges.* * *
>
> * * *[T]he judge has no enforcible expectations with respect to the actual release of a sentenced defendant short of his statutory term. The judge may well have expectations as to when release is likely. But the actual decision is not his to make, either at the time of sentencing or later if his expectations are not met.

As we noted in our opening brief (Br. 72-74), the authority to grant parole is vested in the Parole Commission exclusively, and the exercise of this authority does not usurp the judicial power. See *United States* v. *Grayson*, 438 U.S. 41, 47 (1978).

b. Respondent repeatedly contends (Resp. Br. 57, 81, 83, 98, 100-101) that the parole guidelines fail to give any

consideration to the prisoner's behavior during confinement, as 18 U.S.C. 4206(a) requires.[7] This is incorrect. The application of the guidelines to each prisoner is expressly "predicated upon good institutional conduct and program performance" (Pet. App. 72a n.1). A prisoner's institutional record is considered at several points in the parole decision-making process. At each prisoner's initial parole hearing, the Commission establishes a "presumptive release date" that, depending on the particular facts of the prisoner's offense and personal history (28 C.F.R. 2.12(b); see *id.* at Section 2.20(c), (d), (e)), will be either before, during, or after the guidelines customary release range.[8] Each prisoner's presumptive release date is expressly contingent upon "good institutional adjustment and program progress." *Id.* at Section 2.20(b). Before a prisoner may be released at his presumptive release date, the Commission must make "an affirmative finding [in a pre-release review] * * * that the prisoner has a continued record of good conduct and a suitable release plan * * *." *Id.* at Section 2.12(d). The Commission's rules provide that "the prisoner's overall institutional record [is to be considered] in determining whether the conditions of a presumptive parole date have been satisfied." *Ibid.* If good institutional performance is not maintained, the prisoner's release date may be

[7]The statute conditions parole release upon a determination by the Commission that the prisoner "has substantially observed the rules of the institution or institutions to which he has been confined * * *." 18 U.S.C. 4206(a).

[8]The current regulations of the Parole Commission are shown at 44 Fed. Reg. 3404-3410, 26540-26552 (1979). Citations to the regulations in this brief are to the current regulations.

deferred.[9] *Id.* at Section 2.14(a)(2)(iii), (b)(2)(ii). If exceptional institutional performance is achieved, the prisoner's release date may be advanced. *Id.* at Section 2.14(a)(2)(ii), (b)(2)(ii).[10] Institutional performance thus remains an important factor in the Commission's parole release decisions.

c. Respondent argues (Resp. Br. 76-77, 99-100) that the parole guidelines are applied "mechanical[ly]" and that the Commission's parole decisions are not made "upon consideration of the nature and circumstances of the offense and the history and characteristics of the prisoner." 18 U.S.C. 4206(a). As we demonstrated in our opening brief (Br. 58-60), however, the parole guidelines are not inflexible. Mitigating or aggravating circumstances relating to a particular offense, as well as institutional performance, may justify a decision outside

[9]A prisoner whose personal history and offense are such that he would ordinarily be released within the guideline range may be removed from guideline consideration because of poor institutional performance. In emphasizing that "the Parole Commission [should] reach a judgment on the institutional behavior of each prospective parolee * * *" (S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 25 (1976)), Congress observed that an "understanding by the prisoner of the importance of his institutional behavior is crucial to the maintenance of safe and orderly prisons." *Ibid.*

[10]In the Parole Commission's *Guidelines Application Manual* (Dec. 1, 1978), the Commission instructed its hearing officers that "exceptional institutional program achievement" (*id.* at 4.17) is a basis for advancing a prisoner's projected or actual release date. The Commission's statistics reflect that institutional performance is the most frequently cited reason for going below the guidelines and the second most frequently cited reason for going above the guidelines. P. Hoffman and L. DeGostin, *Parole Decision-Making: Structuring Discretion*, 38 Fed. Probation 7, 10 (December 1974).

the guidelines' ranges.[11] 28 C.F.R. 2.20(c), (d), (e). The Commission has reserved discretion to depart from the guidelines whenever it concludes that the circumstances so warrant. *Id.* at Section 2.20(c). Moreover, the Commission has generally retained authority to revise or modify the guidelines when appropriate. *Id.* at Section 2.20(g).

Individual case consideration is an essential component of the federal parole system because the Commission must, in each case, scrutinize the particular circumstances of the prisoner and his offense to determine how, if at all, the guidelines are to be applied to him. If the guidelines are found applicable to the prisoner, the Commission must then establish a precise release date within the broad range of customary release dates (*e.g.*, 26-36 months) indicated by the guidelines. If the guidelines are found inapplicable, the Commission must determine what release date, if any, is appropriate on the basis of the particular facts of the prisoner's case. The extensive nature of these individual parole inquiries is illustrated by the fact that, in 1978, approximately 11% of the 13,957 individual decisions to release prisoners on parole deferred the date of release beyond the guideline range. During this same period, approximately 10% of the Commission's decisions granted release before the guideline range. *Report of the United States Parole Commission* 15, 19 (1978).

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[11]Factors suggested by Congress as justifying a parole release determination above the guidelines were "whether or not the prisoner was involved in an offense with an unusual degree of sophistication or planning, or has a lengthy [prison] record, or was part of a large scale consipracy or continuing criminal enterprise." On the other hand, a decision below the guidelines might be justified by such factors as "a prisoner's adverse family or health situation." S. Conf. Rep. No. 94-648, *supra*, at 27; H.R. Conf. Rep. No. 94-838, 94th Cong., 2d Sess. 27 (1976).

d. Respondent argues (Resp. Br. 93-94) that Congress intended to require the Commission to consider sentence length in its discretionary parole decisions. Although the statute by its terms imposes no such requirement, respondent contends that the Conference Report indicates that sentence length should be considered. In particular, respondent relies on the fact that the Report states that the Commission's release decisions will have "the practical effect of balancing differences in sentencing policies and practices between judges and courts." S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 19 (1976).[12]

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[12]Respondent contends (Resp. Br. 101 n.102) that the parole guidelines may not be applied to prisoners sentenced to immediate parole eligibility under 18 U.S.C. 4205(b)(2). But in enacting 18 U.S.C. 4206(a), Congress made clear that the Commission is to apply a uniform set of parole release criteria to all federal prisoners, without distinguishing between prisoners sentenced under different parole eligibility schemes. As the Conference Committee explained, the standards embodied in Section 4206(a) are to be applied by the Commission "in making parole release determinations for federal prisoners who are eligible for parole." S. Conf. Rep. No. 94-648, 94th Cong., 2d Sess. 25 (1976). Moreover, both the House and Senate versions of the legislation contained a single set of standards for determining whether or not a prisoner should be released on parole. See S. Rep. No. 94-369, 94th Cong., 1st Sess. 23 (1975); H.R. Rep. No. 94-184, 94th Cong., 1st Sess. 5-6 (1975). Indeed, the Senate Report specifically observed that "the standards and criteria are made the same for all federal prisoners without regard to which of the three main sentencing alternatives is utilized by the court." S. Rep. No. 94-369, *supra*, at 18. There is thus no support, in either the language or history of the statute, for respondent's contention that Congress intended different standards to be applied to adult prisoners sentenced under the different statutory sentencing options. See *Izsak* v. *Sigler*, No. 79-2507 (9th Cir. Aug. 28, 1979); *Shahid* v. *Crawford*, 599 F. 2d 666 (5th Cir. 1979).

For the reasons discussed on pages 60 to 72 of our opening brief, respondent's interpretation of the legislative history is incorrect. We note here only that the statement in the Conference Report, on which respondent relies, accurately describes the practical effect of the parole guideline system. The guidelines do not eliminate *all* sentencing disparity. By providing for "fairer and more equitable [parole] decision-making without removing individual case consideration" (28 C.F.R. 2.20(a)), the guidelines do not treat federal prisoners as fungible. The parole guidelines "moderate the disparities in the sentencing practices of individual judges" (*United States* v. *Addonizio*, *supra*, slip op. 10); they do not require all federal prisoners to serve identical sentences.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be disposed of as stated on page 90 of our opening brief.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1979

DOJ-1979-09

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-572

UNITED STATES PAROLE COMMISSION, ET AL.,
Petitioners

v.

JOHN M. GERAGHTY,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL CLIENT COUNCIL, INC. AND THE JACKSON, MISSISSIPPI CHAPTER OF THE GRAY PANTHERS

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BRIEF AMICUS CURIAE

INTEREST OF AMICI CURIAE AND STATEMENT PURSUANT TO RULE 42.2 OF THE RULES OF THE SUPREME COURT

National Client Council, Inc. is a non-profit corporation representing low-income clients of publicly and privately-funded legal services organizations. Low-income clients from all regions of the United States elect the Board of Directors of National Client Council, Inc., at least two-thirds of whom must be low-income persons eligible

for the legal representation by the legal services organizations. These low-income clients are directly and uniquely affected on a consistent and continuous basis by policies and regulations of federal and state welfare, housing and health agencies and of regulated institutions, such as public utilities, nursing homes, mental institutions, juvenile institutions, local courts and departments of motor vehicles.

The Jackson, Mississippi Chapter of the Gray Panthers is a membership organization of elderly residents of the Jackson, Mississippi area. They have many of the same interests as the clients of National Client Council, Inc., but are especially affected by nursing home and medicaid policies and regulations.

When disputes arise concerning the legality under federal law of these policies and regulations or of the state enabling statutes, the class action device is critical for insuring that the federal courts adjudicate these federal legal questions affecting many people similarly situated. Named plaintiffs in class suits to enforce these rights can be and have been selectively granted their individual rights, raising mootness issues. The prospect of death of an elderly named plaintiff, which would moot his personal claim and perhaps the class claim, is ever present. Thus, both National Client Council, Inc. and the Jackson, Mississippi Chapter of the Gray Panthers have a strong interest in the issue of class action mootness which will be directly affected by the resolution of the mootness question before the Court in this case.

Express consent to file this brief *amicus curiae* has been given by all parties to this suit. The original letter from each counsel is filed herewith.

SUMMARY OF ARGUMENT

Where there is clear injury in fact to the named litigant initially, Article III does not require continuous personal stake by the named litigant in all suits. *Roe* v. *Wade,* 410 U.S. 113 (1973); *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). Rather, continued Article III justiciability turns on continued concreteness of issues and adverseness of interests. *Flast* v. *Cohen,* 392 U.S. 83 (1968); *Baker* v. *Carr,* 369 U.S. 186 (1962).

In class suits, concreteness of issues and adverseness of interests as to the class claim are subsumed within the Fed. Rule Civ. Proc. 23(a) prerequisites, which can be satisfied without regard to whether the representative who initially was injured in fact loses his personal stake. *Sosna* v. *Iowa,* 419 U.S. 393 (1975). Denial of the representative's Rule 23(c)(1) motion for class "certification" does not inherently destroy concreteness or adverseness; class "certification" and class "denial" are creatures of current federal procedure, not constitutional requisites. *Hansberry* v. *Lee,* 311 U.S. 32 (1940). Thus, in proper class suits, where the Rule 23(a) elements are present, the case is justiciable under Article III.

In this case, the nexus between Respondent's facts and the facts of at least a subclass of the pleaded class, and the continued vigorous advocacy of the absentees' interests by class counsel, are evident. The case should be remanded to the district court for a proper Rule 23(c)(1) determination.

ARGUMENT

I. ARTICLE III DOES NOT REQUIRE THE REPRESENTATIVE IN A SUIT FILED AS A CLASS ACTION TO MAINTAIN A PERSONAL STAKE AT ALL TIMES IN ORDER TO APPEAL THE INITIAL CLASS DENIAL.

A. Article III Justiciability Turns On Concreteness Of Issues And Adverseness Of Interests Rather Than Continued Personal Stake Of The Named Parties.

The federal judicial power extends to "cases" or "controversies" under Article III, a limitation excluding "moot" cases. *Franks* v. *Bowman Transp. Co., Inc.*, 424 U.S. 747, 754-56 (1976); *North Carolina* v. *Rice*, 404 U.S. 244, 246 (1971). The words "cases" and "controversies" confine federal court business to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast* v. *Cohen*, 392 U.S. 83, 95 (1968).

Most commonly, the requisite Article III "case" or "controversy" is provided when the named parties have and continue to have sufficient personal stake in the outcome of the immediate controversy so that a judicial order can redress the personal injury. *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). However, numerous lines of Supreme Court cases have established that such a continuous personal stake by the named parties is not always the constitutional requisite.

A personal stake by the named parties is entirely unnecessary in certain representative suits such as where a litigant is an organization seeking to assert the rights of its members, *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123 (1951); *see Warth* v. *Seldin*, 422 U.S. 490, 511 (1975); or where the litigant has a legal duty to absentees with a personal stake, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (parochial school asserting rights of students). And once judicial power is properly invoked, the need for continuous personal stake by the plaintiff, even in non-representative suits, is virtually extinct if the challenged conduct will continue in the future, such as where the issue is "capable of repetition, yet evading review," *Roe* v. *Wade*, 410 U.S. 113, 125 (1973) (abortion statute); where there is "voluntary cessation" of allegedly illegal conduct, *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953); *see County of Los Angeles* v. *Davis*, ___ U.S. ___, 59 L.Ed. 2d 642, 649 (1979); where the litigant raises *"jus tertii"* constitutional claims of third parties, *Craig* v. *Boren*, 429 U.S. 190, 195-96 (1976) (statutory bar to 18-20 year old males buying liquor); and where the case involves a justiciable issue of continued government action, *Storer* v. *Brown*, 415 U.S. 724 (1974); *Moore* v. *Ogilvie*, 394 U.S. 814 (1969) (statutory restrictions on independent candidates' nominating petitions); *see Super Tire Eng'r. Co.* v. *McCorkle*, 416 U.S. 115, 126 (1974).[1]

In all such cases, attenuation of continued personal stake is permissible under Article III because there was clear injury in fact from a specific factual occurrence that will likely recur in similar fashion, giving the suit concreteness.

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[1] *See also* Davis. *The Liberalized Law of Standing*, 37 U. Chi. L. Rev. 450, 470 (1970); Jaffe, *The Citizen As Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. Pa. L. Rev. 1033, 1037-38 (1968); Berger, *Standing to Sue in Public Actions. Is it a Constitutional Requirement?* 78 Yale L. J. 816 (1969); Note, *The Mootness Doctrine In The Supreme Court*, 88 Harv. L. Rev. 373, 377 n.22 (1974); Note, *Standing to Assert Constitutional Jus Tertii*, 88 Harv. L. Rev. 423, 438 n.74 (1974).

Compare with O'Shea v. *Littleton*, 414 U.S. 488 (1974); *Schlesinger* v. *Reservists Committee To Stop The War*, 418 U.S. 208 (1974) (abstract injury insufficient).

Thus, the named parties' continued personal stake is but the most common, but not the constitutionally exclusive, means for a court to insure that the case satisfies Article III. Rather, Article III requires a "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." *Baker* v. *Carr*, 369 U.S. 186, 204 (1962); quoted in *Franks* v. *Bowman Transp. Co., Inc., supra.*, 424 U.S. at 755. Thus, in proper cases it is concreteness of issues and adverseness of interests that satisfies Article III by insuring that the questions are presented both in a specific factual setting that focusses the issues and in an adversary context. *Flast* v. *Cohen, supra; Baker* v. *Carr, supra.*

B. In Proper Class Suits, Concreteness Of Issues And Adverseness Of Interests Are Present Regardless Of Whether The Representative's Claim Is Alive At The Time Of Certification Or Whether The Class Was Denied Or Properly Certified.

Based on this well-established Supreme Court authority, it was entirely consistent for the Court to hold in *Sosna* v. *Iowa*, 419 U.S. 393 (1975) that the representative's loss of her personal stake did not deprive the Court of Article III justiciability to hear the merits of the proper class suit. *See* also *Gerstein* v. *Pugh*, 420 U.S. 103, 110 n.11 (1975); *Franks* v. *Bowman Transp. Co., Inc., supra; Swisher* v. *Brady*, 438 U.S. 189, 213 n.11 (1978). *Sosna* clearly established that class "certification" under Fed. Rule Civ. Proc. 23(c)(1) before the representative's loss of personal stake is *sufficient* to avoid mootness if the suit continues to be a proper class action; but *Sosna* neither addressed nor answered whether class certification preceeding loss of the representative's personal stake is *necessary* to preserve Article III justiciability.

Amici suggest that focussing on the timing of the representative's loss of his personal stake in relation to when the court rules or could have ruled on Rule 23(c)(1) class "certification" misses the essential Article III mark. Continued personal stake by the representative in proper class suits is not the Article III requisite. *Sosna* v. *Iowa, supra.* Rather, where the representative initially has a justiciable claim, the question is whether the requisite concreteness of issues and adverseness of interests continue to exist in the class suit. Indeed, concreteness and adverseness are the very form and essence of class actions, and are embodied in the Rule 23(a) prerequisites.

1. Concreteness Of Issues Is Present Where The Facts Of The Representative's Initially Justiciable Claim Are Sufficiently Similar To The Absentees' Factual Circumstances.

Concreteness of issues is necessary to insure that a judicial decision is not rendered in a vacuum, as would be with an unripe case or an advisory opinion. *See Hall* v. *Beals*, 396 U.S. 45, 48 (1969). In class suits, the representative must have individual standing at the time of filing to satisfy Article III initially and must be a member of the class. *Sosna* v. *Iowa, supra*, 419 U.S. at 402-03; *O'Shea* v. *Littleton, supra*, 414 U.S. at 494; *Bailey* v. *Patterson*, 369 U.S. 31 (1962). These requirements, insuring that the case

is ripe and redressable through judicial process, function as the mold into which the court can fashion its legal construct. *See Kremens* v. *Bartley*, 431 U.S. 119 (1977).[2]

By filing a class complaint, the representative with individual standing brings absentees' interests before the court. *See McArthur* v. *Southern Airways, Inc.*, 556 F.2d 298 (5th Cir. 1977) (Rule 23(e) governs plaintiff's attempt to drop class allegations from complaint "as a matter of right" under Fed. Rule Civ. Proc. 15); 3B Moore's *Federal Practice* ¶ 23.50 at 23-423 (1978). The court can exercise its judicial power with respect to those interests only where a sufficient bond or "nexus" exists between the representative's facts and the absentees', so that reference to the representative's past injury focusses judicial attention on the absentees' circumstances as well. *See Hansberry* v. *Lee*, 311 U.S. 32, 41-43 (1940) ("interests of those not joined [must be] of the same class as the interests of those who are"); Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 387 & n.120 (1967) (interests must be "closely alligned"); Equity Rule 38 (1912) ("when the question is one of common or general interest to many persons constituting a class . . ."); *see generally* Newberg, *Newberg on Class Actions* 122-46 (1977).[3]

[2] The requirement for individual standing initially by the representative also helps protect against collusive suits favoring the defendant and screens out indifferent and barratrous volunteers, thereby contributing to adverseness of interests. See *pp.* 12-14, *infra.*

[3] A classic example of how this "nexus" element satisfies Article III concerns is the defendant class action, in which a plaintiff sues a defendant as representative of a defendant class of absentees with whom the plaintiff has no personal controversy cognizable under Article III. Where the defendant representative's and the absentees' circumstances are sufficiently close, a "juridical link" exists so that Article III justiciability is satisfied as to the absentees. *See Washington* v. *Lee*, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd per curiam*, 390 U.S. 333 (1968) (plaintiffs in one prison could sue sheriffs and wardens in all state jails in challenge to segregation); *Kidd* v. *Schmidt*, 399 F. Supp. 301 (E.D. Wisc. 1975) (plaintiffs could sue all state officials authorized to admit persons to state and county institutions in challenge to civil commitment without a hearing); Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630 (1978).

To satisfy this focussing element, current Rule 23(a)(2) and (3) require that the claims of the representative be "typical" of those of the class and that there are questions of law and fact "common" to the class. These Rule 23 elements insure that a court will not be rendering a decision "affect[ting] the rights" of absentees and "touching the[ir] legal relations" with the defendant, *North Carolina* v. *Rice, supra*, 404 U.S. at 246, without regard to the material facts of their circumstances. If these elements exist, the absentees' continued controversy with the defendant is brought into proper focus and the broad case, involving many persons and their interests, has concreteness. *Geraghty* v. *United States Parole Comm'n*, 579 F.2d 238, 250 (3d Cir. 1978).[4]

The connection between Rule 23(a)'s "nexus" requirements and Article III has been referred to by the Court

[4] The nature of the "nexus" aspect of Rule 23 is most clear in proper class suits for equitable relief under Rule 23(b)(2), where "the party opposing the class has acted or refused to act on grounds generally applicable to the class." In such suits, the interests of class members and the representative necessarily have a greater "cohesiveness," *United States* v. *Alleghany-Ludlum Inds., Inc.*, 517 F.2d 826, 878 (5th Cir. 1975) ("the (b)(2) class is by definition a cohesive aggregate"), that permits a court to bind the class member by a judgment even without pre-judgment notice and the right to opt-out of the action. Rule 23(c)(2), (3); *Hansberry* v. *Lee*, 311 U.S. 32, 40-43 (1940); *Wetzel* v. *Liberty Mutual Ins. Co.*,

on several occasions. In *Kremens* v. *Bartley, supra,* the Court refused to adjudicate the constitutionality of Pennsylvania statutes governing the admission and commitment of minors to institutions, in light of statutory amendments during the pendency of the case that had mooted the personal claims of minors over 14, including all the representatives'. The amendments "fragmented" the class, 431 U.S. at 128, created an "obvious lack of homogeneity." *id.* at 130, and gave the Court "grave doubts" as to compliance with Rule 23(a) and thus justiciability under Article III. *See id.* at 129-30, 131 n.12, 134 n.15. In essence, the nexus between the representative's claims and the remaining absentees' was unclear, and so was the Court's Article III jurisdiction as a result.[5] *See* also *Hall* v. *Beals, supra* (in

508 F.2d 239, 254-57 (3d Cir.), *cert. den.*, 421 U.S. 1011 (1975); *see Quern* v. *Jordan*, ___ U.S. ___, 59 L.Ed.2d 358, 363 n.3 (1979). By definition, the defendant's conduct applies to all class members and subjects them all to the same continuing policy.

In class suits under Rule 23(b)(3), the existence of sufficient "nexus" to provide Article III concreteness may depend upon the type of suit. Where the action challenges or arises from a definite and uniform policy, such as the legality of a printed form, computer calculation, or undisputed practice, e.g., *Roper* v. *Consurve, Inc.*, 578 F.2d 1106 (5th Cir. 1978), *cert. granted*, No. 78-904 (Mar. 5, 1979) (legality of uniform interest computation method), the action is identical to a (b)(2) class suit except that only damages for past injury rather than equitable relief against future conduct is involved. *See Airline Stewards, etc.* v. *American Airlines, Inc.*, 490 F.2d 636, 646 (7th Cir. 1973), *cert. den.* 416 U.S. 993 (1974) (suit for both injunctive and monetary relief certified under (b)(2) should be recertified under (b)(3) when injunctive relief claim becomes moot). However, when the defendant's conduct is more individualized, and the class suit is a mere conglomeration of claims, the "nexus" most likely will be lacking.

[5] If concreteness is obscured because the issues in the case have been so altered that the named representative was never a member

challenge to six months residency requirement for voter registration, statutory amendment reducing residency period to two months destroyed class cohesiveness, rendering action moot).

Similarly, in *Gerstein* v. *Pugh, supra,* 420 U.S. at 110 n.11, a challenge to pretrial detention procedures, the court emphasized that the "constant existence of a class of persons suffering the deprivation is certain" in rejecting a mootness claim. The certainty that the absentees' suffered and will suffer the same deprivation suffered by the representative gave the case the requisite concreteness. *Compare Board of School Comm'rs* v. *Jacobs,* 420 U.S. 128 (1975) (per curiam) (case moot where no class was defined and the focus of the class suit, a student newspaper, had ceased publication entirely). *See also Roper* v. *Consurve, Inc.,* 578 F.2d 1106, 1111 (5th Cir. 1978), *cert. granted,* No. 78-904 (Mar. 5, 1979) (representative who was offered full relief maintained sufficient nexus with class members to satisfy Article III).[6]

of the class whose claims remain to be adjudicated, and as long as the class claim is properly before the court either through previous certification or appeal of the failure to certify, *see* pp. 14-19 *infra,* the reviewing court should remand for substitution of a new representative. *Kremens* v. *Bartley, supra,* 431 U.S. at 134-35; *cf. Goodman* v. *Schlesinger,* 584 F.2d 1325, 1332-33 (4th Cir. 1978). In such cases, notice should be sent to the absentees to inform them of the status of their rights. *See Quern* v. *Jordan,* ___ U.S. ___, 59 L.Ed.2d 358, 362-64 (1979); *Shelton* v. *Pargo, Inc.,* 578 F.2d 1298 (4th Cir. 1978); Rule 23(d)(2).

[6] The Court has applied the same principle in the context of Article III taxpayer "standing," holding that there must be a "logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen,* 392 U.S. 83, 102 (1968); *Schlesinger* v. *Reservists to Stop the War,* 418 U.S. 208, 227-28 (1974).

Clearly, the nexus between the representative's facts and the absentees', and thus Article III concreteness, does not depend at all on whether or even when the representative loses his personal stake. It is a function of the facts giving rise to the representative's initial injury as compared to the absentees' circumstances, i.e. initial standing and "commonality" and "typicality." Subsequent developments not pertaining to this nexus may moot the representative's personal claim but are irrelevant to Article III concreteness.[7]

2. Adverseness Of Interests Is Present Where There Is Vigorous Representation Of The Interests Of Absentees With A Continuing Stake In The Defendant's Challenged Policy.

Article III requires that the issues be presented in an adversary context to sharpen the issues and to insure against collusive suits. *Flast* v. *Cohen, supra,* 392 U.S. at 95. In class actions, due process mandates that the absentees' interests be adequately represented before the absentees can be bound by a judgment. *Hansberry* v. *Lee, supra.* Rule 23(a)(4)'s adequate representation prerequisite imposes on the representative and class counsel a strict obligation to vigorously assert the class members' interests to bring those interests fully to the court's attention. E.g., *Gonzales* v. *Cassidy,* 474 F.2d 67, 72 (5th Cir. 1973); *Mersay* v. *First Republic Corp. of America,* 43 F.R.D. 465, 470

[7] Similarly, the nexus and Article III concreteness do not depend on whether the representative loses his personal stake through elapse of time, conduct of the defendant or even interim court order. *See Roper* v. *Consurve, Inc., supra; Frost* v. *Weinberger,* 515 F.2d 57 (2d Cir. 1975).

(S.D.N.Y. 1968).[8] To be a proper class suit, adequate representation must persist throughout the litigation, including the appellate stage. *Gonzales* v. *Cassidy, supra.*

It is clear from *Sosna* and subsequent decisions that adverseness of interests in a class action can be present without regard to the representative's loss of his personal stake as long as the class counsel still vigorously asserts the class members' interests. In *Sosna,* the class counsel "competently argued [the interests of the class] at each level of the proceeding;" despite the absence of a representative with a live stake on appeal, Rule 23(a) was satisfied and the case was not moot. 419 U.S. at 403. In *Franks* v. *Bowman Transp. Co., supra,* 424 U.S. at 756, the Court found the case still presented a live controversy because, in part, "No questions [were] raised concerning the tenacity and competence of the [class] counsel . . . ." Indeed, the Court specifically held that the representation of the claims of the unnamed class members presented the "adversary relationship" to confer Article III justiciability. *Id.* at 755-76. And in *Gerstein* v. *Pugh, supra,* 420 U.S. at 110 n.11, the

[8] *Hansberry* v. *Lee* shows the congruence of adequate class representation and Article III adversity. An earlier suit to enforce a racially restrictive covenant had been brought as a class action on behalf of all affected landowners. The parties to that class suit stipulated that 95 percent of the landowners signed the covenant, as required by its terms, and the state court upheld the covenant's validity. The *Hansberry* suit was brought to enforce the covenant against blacks who acquired land in violation of the covenant. The *Hansberry* state court found that the stipulation was "false and fraudulent," 311 U.S. at 38, but nonetheless gave res judicata effect to the earlier class suit judgment. The Court held the earlier judgment was not binding in light of the inadequate representation of absentees' interests precisely because the earlier suit was a "collusive" suit brought against "nominal defendants." *Id.* at 45-46.

lack of a representative with a live claim was no bar to Article III justiciability where "the attorney representing the named respondents is a public defender, and we can safely assume that he has other clients with a continuing interest in the case," presumably whose interests he was advocating.

Thus, just as the Rule 23(a) class prerequisites can continue to be satisfied despite the loss of a representative with a personal stake, *Sosna* v. *Iowa, supra; Gerstein* v. *Pugh, supra,* the Article III elements of concreteness of issues and adverseness of interests, embodied in the same Rule 23(a) prerequisites, can obtain without regard to a continuing live interest by the representative. Where the class action is a proper class action, that is, "certifiable" pursuant to Rule 23, Article III's elements will necessarily be present and the case will not be moot.

3. Article III Justiciability Is Not Determined By Whether Class "Certification" Was Properly Ordered Or Was Denied.

As long as the absentees in a class suit are provided due process, the Constitution does not require any particular class action procedure, including Rule 23(c)(1) "certification," to enable the court to reach the merits of the absentees' claims and bind them by judgment. *Richardson* v. *Ramirez,* 418 U.S. 24, 39 (1973); *Hansberry* v. *Lee, supra,* 311 U.S. at 42-43. Indeed, class actions derive from old English equity courts, *see* 3B Moore's *Federal Practice* ¶ 23.02[1] at 23-36 (1978) and have been expressly recognized by the Court as a federal procedural device for well over one hundred years. *Smith* v. *Swormstedt,* 57 U.S. (16 How.) 288 (1853). Class "certification" and class "denial"

are but creatures of current Rule 23 procedure, existing but 13 years, and thus not Article III mandates. *Compare* Rule 23(c)(1) *with* Equity Rule 38 (1912); *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U.S. 356 (1921); *Smith* v. *Swormstedt, supra.* Consequently, a court order pursuant to Rule 23(c)(1) "certifying" the class is not grounded in Article III and alone cannot confer Article III jurisdiction. *See Zahn* v. *International Paper Co.,* 414 U.S. 291 (1972); *Snyder* v. *Harris,* 394 U.S. 322 (1969); Fed. Rule Civ. Proc. 83 (Rule 23 cannot enlarge Article III jurisdiction); *see also Sosna* v. *Iowa, supra,* 419 U.S. at 413-14 (White, J. dissenting).[9]

Rule 23(c)(1) "certification" is a procedure designed "to give clear definition to the class . . . ." *Advisory Committee's Note to Amended Rule 23,* 39 F.R.D. 98, 104 (1966). It is useful for aiding the courts, the parties, and interested persons in determining the scope and res judicata effect of the judgment in a class suit.[10] In a subsequent

[9] Certainly, as an order that Rule 23(a)'s elements are satisfied, at least conditionally, the "certification" order confirms that concreteness of issues and adverseness of interests are present, *see* pp. 7-14 *supra,* and is therefore sufficient to permit the suit to proceed without regard to the representative's personal stake. *Sosna* v. *Iowa, supra; Gerstein* v. *Pugh, supra; Swisher* v. *Brady, supra.* However, this is not to say that the "certification" order itself confers Article III justiciability. It is but an appropriate proxy for the existence of concreteness and adverseness that a court can use to avoid extended inquiry into Article III issues in every class action whenever the representative loses his personal stake. In other words, if the class is certified, and the court is convinced the certification continues to be proper, the class action necessarily has concreteness and adverseness, inasmuch as Rule 23(a) embodies Article III justiciability; the court need pursue the matter no further.

[10] The early nature of the Rule 23(c)(1) certification order is designed to avoid the prejudice of "one-way intervention" and to

suit based on similar claims, the court is better able to determine what was adjudicated and on whose behalf where there is a clear class order. *See Berry Petroleum Co.* v. *Adams & Peck,* 518 F.2d 402, 411 (2d Cir. 1975); Note, *Collateral Attack on the Binding Effect of Class Action Judgment,* 87 Harv. L. Rev. 589 (1974). Importantly for the representative, a "certification" order is a procedural requirement of the Federal Rules of Civil Procedure that must be complied with before the court can address the merits of the absentees' claims.[11]

Similarly, denial of the representative's Rule 23(c)(1) motion to have the class "certified" is only a procedural ruling under current federal practice that the representative has not shown compliance with Rule 23(a) and (b). Without any further order under Rule 23(c)(1), the action cannot gain the status of a "certified" Rule 23 class action so that the absentees' claims can be adjudicated. The court's denial of the Rule 23(c)(1) motion does no more. Only if such an order automatically and irrevocably extinguishes the class issues from the suit entirely in every respect can it affect justiciability. But this Court has consistently held that class denial does not eliminate the class issues from the case entirely.[12]

aid the court in directing the course of the proceeding. *See American Pipe & Construction* v. *Utah,* 414 U.S. 538, 545-49 (1974). However, especially in 23(b)(2) actions, early certification is not mandatory. *Jiminez* v. *Weinberger,* 523 F.2d 689, 700 (7th Cir. 1975); 3B Moore's *Federal Practice* ¶ 23.50 at 23-430 to 23-432 (1978).

[11] Thus, if the district court fails to properly certify the class pursuant to Rule 23(c)(1), and that failure is not appealed by the representative as error, the appellate court cannot address the merits of the class members' claims. *See Board of School Comm'rs* v. *Jacobs,* 420 U.S. 128 (1975).

In the companion cases of *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463 (1978) and *Gardner* v. *Westinghouse Broadcasting Co.,* 437 U.S. 478 (1978), concerning the interlocutory appealability of orders denying motions for class certification, the Court held that such an order "is subject to revision" and "inherently tentative," *Coopers & Lybrand,* 437 U.S. at 469 & n.11, and has no "irreparable effect" on the class claims in the suit. *Gardner,* 437 U.S. at 480. In *Gardner,* the Court adopted the Court of Appeal's language that "If, after final judgment the [injunctive] relief granted is deemed unsatisfactory [to protect the class members], the question of class status is *fully* reviewable." *Id.* at 480 n.6 (emphasis added), quoting from 559 F.2d 209, 212 (3d Cir. 1977).

In *United Airlines, Inc.* v. *McDonald,* 432 U.S. 385 (1977), the Court ruled that an unnamed class member could intervene after final judgment to appeal the earlier express class denial, even though the named plaintiffs had received

[12] The reference in the *Advisory Committee's Note to Amended Rule 23,* 39 F.R.D. 98, 104 (1966) that the case is "stripped of its character as a class action" by a class denial clearly does not pertain to Article III justiciability or preservation of the class claims for appeal. The same paragraph expressly points to "the laws governing jurisdiction" and other matters for the answers to such questions. The intent by this reference was that the class denial affirmatively relieves the court and the plaintiff of their obligations to the absentees. *See United Airlines, Inc.* v. *McDonald, supra,* 432 U.S. at 393; *compare Pearson* v. *Ecological Science Corp.,* 522 F.2d 171, 177-78 (5th Cir. 1975), *cert. den.,* 425 U.S. 912 (1976) (parties' individual settlement after class denial not subject to Rule 23(e)) with *McArthur* v. *Southern Airways, Inc., supra* (attempt to drop class allegations pursuant to Rule 15 before defendant filed answer was subject to Rule 23(e)).

all the relief they sought for themselves. The Court held that "The District Court's refusal to certify was subject to appellate review after final judgment at the behest of the named plaintiffs . . . ." 432 U.S. at 393.[13] If the class denial had extinguished the class claims entirely, the plaintiffs' receipt of all their relief would have precluded any further pursuit of the class issues in that litigation.

East Texas Motor Freight Systems, Inc. v. *Rodriguez*, 431 U.S. 395 (1977) is in accord. There, the district court denied the class and found that the representatives suffered no injury from the challenged discriminatory practices. The representatives did not appeal the loss of their individual claims, 431 U.S. at 401, but appealed only the class denial. On review, neither the Fifth Circuit nor this Court suggested that a representative without a live personal claim could not appeal the class denial, but proceeded to analysis of the Rule 23 elements. Again, the class denial was preserved through appeal. *See* also *Wheeler* v. *American Home Products Corp.*, 582 F.2d 891, 897-98 (5th Cir. 1977); *Romasanta* v. *United Airlines, Inc.*, 537 F.2d 915, 919 n.7 (7th Cir. 1976), *aff'd sub nom. United Airlines, Inc.* v. *McDonald*, 432 U.S. 385 (1977) (class denial in Title VII suit does not strip case of its class character so entirely that class members are barred from intervening thereafter to prosecute their individual claims even though they did not

[13] This holding was essential to the ruling; if the named plaintiff could not appeal the class denial upon final judgment, an unnamed class member would have had to intervene upon class denial to protect his own interests, and the move to intervene after final judgment would have been untimely. The Court characterized this as "[t]he critical factor." 432 U.S. at 394

satisfy the administrative exhaustion requirements of Title VII).[14]

C. The Representative In A Proper Class Suit Need Have No Personal Stake In The Class Claim To Appeal The Class Denial.

The ability of a representative to appeal the class denial upon final judgment, *Coopers & Lybrand* v. *Livesay, supra; Gardner* v. *Westinghouse Broadcasting Co., supra,* is not at all based on the representative's having a personal stake in the class claim. Indeed, except possibly in the rare class

[14] There are also strong policy reasons for preserving the potential class claims through final appeal of the class denial. If denial irretrievably extinguishes the class claims from the suit, trial courts would be constrained to certify questionable classes to preserve the class claims, thereby prejudicing the defendant. *See Katz* v. *Carte Blanche Corp.*, 496 F.2d 747 (3d Cir.), *cert. den.*, 419 U.S. 885 (1974) (test case may be superior to certification). Class denial would be unreviewable both as a matter of Article III justiciability, and as a practical matter because of the almost certain running of the statute of limitations until final review is possible. *See Gelman* v. *Westinghouse Electric Corp.*, 556 F.2d 669, 701 (3d Cir. 1977); *Esplin* v. *Hirschi*, 402 F.2d 94, 101 n.14 (10th Cir. 1967), *cert. den.*, 394 U.S. 928 (1969). Interlocutory appeal from the class denial might be necessary. *cf. Coopers & Lybrand* v. *Livesay; Gardner* v. *Westinghouse Broadcasting Co.* Absentees would have to intervene or file new suits at an early stage to protect their interests. *See United Airlines, Inc.* v. *McDonald.* The judicial economy inherent in class actions would be wasted. *See American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538 (1974).

Where the mootness occurs prior to class denial, judicial economy would seem to demand preservation of the class claims. Otherwise, class members would have to intervene immediately upon filing of the class suit to protect their interests.

suit where the absentees are true indispensible parties, the representative never has a legally cognizable personal stake in the class claim at all.[15]

Adding class allegations to the complaint gains nothing personally for the representative; the representative cannot gain by the class device what he cannot do on his own. *Schlesinger* v. *Reservists Committee to Stop the War,*

[15] Defendant class actions are no exception. In such actions, where the plaintiff has a claim against all defendants, the class device is used by the plaintiff merely to join all the plaintiff's claims in one suit. *See United States* v. *Truckee-Carson Irrigation District,* 71 F.R.D. 10 (D.Nev. 1975); *United States* v. *Trucking Employers, Inc.,* 72 F.R.D. 101 (D.D.C. 1976). The plaintiff is not the representative at all. The named defendant may be required to be a representative over his objection and without any personal stake in the absentees' claims. *United States* v. *Trucking Employers, Inc., supra; Hopson* v. *Schilling,* 418 F.Supp. 1223, 1237 (N.D.Ind. 1976); *Thompson* v. *Bd. of Ed.,* 71 F.R.D. 398, 407 n.13 (W.D.Mich. 1976). From the plaintiff's perspective, the defendant class action is merely a variation of the interpleader procedure, where all claims *adverse* to the plaintiff can be adjudicated in one suit.

Indeed, class suits where the absentees are indispensable parties are similar to defendant class actions in this respect. The representative's personal interest in the class suit is merely to overcome judicial reluctance to adjudicate suits directly affecting the rights of persons not represented in the proceeding. The representative has no personal stake in the absentees' claims, merely an interest in the procedural device as a means of securing an adjudication of his personal claim. *See* 3B Moore's *Federal Practice* ¶ 23.02[1] at 23-36 to 23-38 (the class action in English equity was both an escape from and an adjustment to the rule of compulsory joinder). Absent this judicial reluctance, the would-be representative could receive a decree fully satisfying his personal interest without resort to the class suit. *See* Rule 23(b)(1)(A) (focus on rights of party opposing the class) and Rule 23(b)(1)(B) (focus on interests of absent class members), neither of which is concerned with the rights or stake of the representative.

supra, 418 U.S. at 216; *O'Shea* v. *Littleton, supra,* 414 U.S. at 494. In *Sosna, Gerstein, Swisher* and *Franks,* each representative could have secured full individual relief, that is, a judgment enjoining the residency requirement for a divorce, the pretrial detention procedures, the state's ability to make exceptions to the juvenile master's findings, and the trucking company's seniority rules, each as applied to him or her personally, without any need for the class action device.[16] Yet, the court could adjudicate the absentees' claims because of the "recognized exception" in representative suits to the due process principle that a court has no jurisdiction to bind a person by judgment unless he is personally before the court. *Hansberry* v. *Lee, supra,* 311, U.S. at 41.

Without a personal stake in the class claim, the representative cannot possibly have a personal stake in the appeal of the class denial. A party cannot appeal a judgment where he can gain nothing legally cognizable from the appeal. *New York Telephone Co.* v. *Maltbie,* 291 U.S. 645 (1934) (utility that secured permanent injunction against enforcement of rate orders could not appeal portions of the decree); *Bogus* v. *American Speech & Hearing Ass'n,* 582

[16] Obviously, there are advantages to a person in bringing a class suit. His claim or interest usually is too insubstantial to warrant the enormous expense to him personally of litigation, and no attorney will accept the suit without the prospect of fees from the class recovery. *See Hawaii* v. *Standard Oil Co.,* 405 U.S. 251, 266 (1972). A person may have an interest in seeking redress for other people or deterring fraud or illegal conduct in the market place. *See* generally Kalven & Rosenfeld, *The Contemporary Function of the Class Suit,* 8 U.Chi.L.Rev. 684 (1941). However, none of these advantages is a legally cognizable interest that could be asserted judicially or grant Article III jurisdiction. *See Warth* v. *Seldin, supra; O'Shea* v. *Littleton, supra.*

F.2d 277, 291 (3d Cir. 1978) (party could not appeal denial of others' motion to intervene); Wright, Miller & Cooper, 15 *Federal Practice & Procedure* § 3902 (1976).[17]

Thus, in *Coopers & Lybrand* v. *Livesay, supra,* a suit brought under Rule 23(b)(3) for damages for violations of the federal securities laws, the representative's claim was entirely distinct from every class members', and the representative could pursue and secure full individual monetary relief without the class claim. Yet, the representative's ability to file the suit as a class action and appeal the class denial after final judgment was never in doubt. Whether Livesay wins on his individual claim through adjudication, loses on the claim, or receives full relief by settlement will have no affect on either his personal stake in the class claim or his ability to appeal the class denial.[18]

In *Gardner* v. *Westinghouse Broadcasting Co., supra,* the class denial had no adverse effect on the scope of injunctive relief the representative could secure to enforce her individual interests if she prevailed on her individual

[17] While there can be an exception for a judgment having adverse res judicata or collateral estoppel significance, *see Electric Fittings Corp.* v. *Thomas & Betts Co.,* 307 U.S. 241 (1939) (patent infringement suit by patent holder; defendant who prevailed on finding of no infringement can appeal judgment because holding of patent validity has res judicata effect), class denial has no res judicata effect. *Pearson* v. *Ecological Science Corp., supra,* 552 F.2d at 177-78; *see Coopers & Lybrand* v. *Livesay, supra; Gardner* v. *Westinghouse Broadcasting Co., supra.*

[18] The outcome on the representative's individual claim certainly may have a bearing on his ability to represent the class under Rule 23. *East Texas Motor Freight Systems, Inc.* v. *Rogriguez, supra.* But this is an issue of compliance with Rule 23(a)'s strict adequacy of representation requirement, not Article III justiciability. *See id.* (Article III not raised where representatives appealed class denial after loss on merits of individual claims).

claim. Thus, whether she wins or loses on her personal claim does not affect her lack of legally cognizable interest in the class denial. *See also United Airlines, Inc.* v. *McDonald, supra* (successful representative could appeal class denial); *East Texas Motor Freight Systems, Inc.* v. *Rodriguez, supra* (unsuccessful representatives appealed class denial); *Gonzales* v. *Cassidy, supra* (fully successful representative has continuing duty to class members to pursue their interests through appeal).[19]

D. The Court's Class Action Decisions Demonstrate Clearly That The Representative Need Not Have A Personal Stake At The Time Of Certification, Irrespective Of Whether The Motion For Class Certification Was Previously Denied.

On four occasions this Court has expressly recognized that federal courts are not divested of Article III justiciability merely because the representative in an action filed as a class action but not yet certified as such loses his personal stake in the controversy.

In *Gerstein* v. *Pugh, supra,* the court approved certification of the class and rejected a claim of mootness despite the absence of any showing in the record that any of the named plaintiffs was still in custody awaiting trial at the

[19] Thus, Petitioners entirely miss the mark in attempting to distinguish *McDonald* by suggesting that a representative who has secured full individual relief "suffered from the adverse class determination" only where, as in *McDonald,* that relief was, or may have been, secured by judgment. Pet.'s Brief at 37-39. Not only is there no support in any class action decision for this distinction, but no representative "suffers" from a class denial in any sense of legal injury in fact, regardless of whether the representative prevails individually by judgment, loses on the merits, or receives full satisfaction in other ways.

time of certification.[20] In *Swisher* v. *Brady, supra,* the Court held that the fact that none of the named plaintiffs was still subjected to possible double jeopardy "did not deprive the District Court of the power to certify the class action when it did and that, accordingly, a live controversy presently exists between the unnamed class members and the State." In *United Airlines, Inc.* v. *McDonald, supra,* the potential class claims survived both express denial and full satisfaction of the representatives' individual claims to permit intervention by an unnamed class member upon final judgment to appeal the class denial.

Similarly, in *Richardson* v. *Ramirez, supra,* 418 U.S. at 33-40, a California state court class suit brought by three ex-felons challenging the constitutionality of their disen-

[20] Petitioners argue that only "capable of repetition, yet evading review" class actions can survive pre-certification mooting of the representative's claim. Pet.'s Brief at 31-36. However, *Franks* v. *Bowman Transp. Co., Inc., supra,* 424 U.S. at 756 n.8, clearly rejects this claim: "Thus, the 'capable of repetition, yet evading review' dimension of *Sosna* must be understood in the context of mootness as one of the policy rules often invoked by the Court . . . [which] find their source in policy, rather than purely constitutional considerations.' *Flast* v. *Cohen,* 392 U.S. 83, 97 (1968)." *See also id.* at 781 (Powell, J., concurring in part) (the doctrine is "only a factor in our discretionary decision whether to reach the merits of an issue, rather than an Art. III 'case or controversy' requirement."). Furthermore, Petitioners' assertion that the doctrine applies in class actions, as in non-class actions, only "because the named plaintiff's claim itself may be adjudicated," Pet.'s Brief at 32, flies in the face of *Sosna,* where the Court specifically found that Mrs. Sosna's claim was moot and applied the doctrine to the absentees' claims. 419 U.S. at 400; *id.* at 411 (White, J., dissenting). Thus, in *Sosna,* as in *Gerstein* and *Swisher,* the case would have been moot but for its class nature. *See also United Airlines, Inc.* v. *McDonald, supra,* clearly not a "repetition/evasion" case.

franchisement, the Court expressly held that the defendant's acquiescence to the representatives' individual claims before the state court reached either the class issue or the merits did not moot the case. The Court found a live controversy between the class members and the defendants despite the hiatus between this loss of personal stake and any judicial recognition of the action as a class action.[21]

Thus, neither loss of the representative's personal stake prior to judicial recognition of the action as a class action, as in *Gerstein, Swisher* and *Richardson*[22] nor express class denial and subsequent loss of any personal stake in further relief, as in *McDonald,* moots the case filed and vigorously prosecuted as a class action.

The three cases where the Court found the class claims moot after the representative's claim became moot are entirely consistent. In *Board of School Comm'rs* v. *Jacobs, supra,* the district court's failure to comply with Rule 23(c)(1) in ruling on class status was not assigned as error. As a result, the Court did not have the class before it as a matter of federal procedure, and absent a live plaintiff, the case was moot.

[21] Although *Richardson* was a state court case, and the state was "at liberty to prescribe its own rules for class actions," those rules were "subject . . . [to] the United States Constitution," 418 U.S. at 39, and could not confer on this Court an otherwise absent Article III jurisdiction.

[22] The dicta in *Sosna* v. *Iowa, supra,* where the representative's claim was clearly alive at certification, 419 U.S. at 398, that the named plaintiff must have a live controversy "at the time the class action is certified by the District Court pursuant to Rule 23," *id.* at 402, was "drained" of its "apparent force" by *Gerstein, Swisher,* and *McDonald. See Frost* v. *Weinberger,* 515 F.2d 57, 64 (2d Cir. 1975). Even *Sosna* itself recognized that this dicta was not mandated by Article III. 419 U.S. at 402 n.11.

As an Article III case, *Jacobs* can be best understood in terms of concreteness of issues and adverseness of interests. The failure of counsel to seek a proper class certification, 420 U.S. at 130, or pursue the issue on appeal, cast serious doubt on the adequacy of representation under Rule 23(a)(4) and thus Article III adverseness. *See East Texas Motor Freight Systems, Inc.* v. *Rodriguez, supra,* 431 U.S. at 404-05. More importantly, *Jacobs* was a First Amendment case involving the rights of students to control the contents of a student newspaper. 420 U.S. at 129. When the individual students involved graduated *and* the newspaper ceased publication, 420 U.S. at 133 (Douglas, J., dissenting), the case became hopelessly diffused. The absence of any focus for the Court to measure the First Amendment issues deprived the suit of any concreteness of issues.[23]

In *Weinstein* v. *Bradford,* 423 U.S. 147 (1975) (per curiam), the class representative filed with the Court a suggestion of mootness, thereby abandoning the class claims and eliminating the potential adverseness of interests. While the case was brought as a class action, it was neither certified as such under Rule 23(c)(1) nor prosecuted to this Court as such, and was properly treated as a non-class action. *Pasadena City Bd. of Ed.* v. *Spangler,* 427 U.S. 424 (1976) is similar. There the purported representative did not raise in this Court as error the failure of the lower court to comply with Rule 23(c)(1).

[23] *Franks* v. *Bowman Transp. Co., Inc., supra,* also sharply reduces any force of the particular *Jacobs* language. *Jacobs* stated that the case is moot "unless it was duly certified as a class action . . . *and* the issue is capable of repetition yet evading review." 420 U.S. at 129 (emphasis added). As discussed in note 20 *supra, Franks* laid to rest this postulation of the mootness doctrine in class actions.

In any event, because the United States had intervened as a party, the liveness of the class claims was irrelevant to the Court's reaching the merits. 427 U.S. at 430.

II. APPLYING THESE PRINCIPLES TO THIS CASE DEMONSTRATES THAT THE CLASS CLAIMS HERE IN ALL LIKELIHOOD ARE NOT MOOT; THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR A CLASS ACTION DETERMINATION AS THE COURT OF APPEALS DIRECTED.

Both concreteness of issues and adverseness of interests almost certainly remain in this case. Respondent was a prisoner affected by the allegedly illegal parole guidelines in the same way as all prisoners sentenced under the same statute as Respondent and whose "customary release dates" fall beyond their sentence period.[24] Current prisoners and future prisoners in that category continue to be and will continue to be similarly affected by the guidelines. The legality of the guidelines under the Parole Commission and Reorganization Act, 18 U.S.C. §§ 4201-4218 and the ex post facto prohibition of the Constitution is an issue uniform to all such prisoners and does not turn on factual variations in the absentees' circumstances. *Geraghty* v. *U.S. Parole Comm'n, supra,* 579 F.2d at 252. Thus, those prisoners' rights can be adjudicated with reference to Respondent's facts at the time of filing. *Sosna* v. *Iowa, supra; Gerstein* v. *Pugh, supra.* Counsel's continued vigorous advocacy of their interests, *Geraghty* v. *U.S. Parole Comm'n,*

[24] This is the smallest class Respondent could represent under the Court of Appeals' analysis. *Geraghty* v. *United States Parole Comm'n, supra,* 579 F.2d at 253-54.

579 F.2d at 252, provides the requisite adverseness of interests. *Franks* v. *Bowman Transp. Co., Inc., supra.*

Neither Respondent's release from prison nor the district court's order denying the motion to certify the class under Rule 23(c)(1) alters any of these facts. Thus, the class claim, preserved for appellate review of the class denial order, is appropriate for adjudication and not moot if this suit is a proper class action. The case should be remanded to the district court for determination of the class action question pursuant to Rule 23(c)(1) in light of the Court of Appeals' directives.[25]

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[25] *Amici* do not address whether this is in fact a proper class action.

As to *Deposit Guaranty National Bank* v. *Roper*, No. 78-904, this analysis strongly suggests that the case was not mooted by the defendant's tender of full damages to the named plaintiffs after class denial. The class denial was based neither on a lack of nexus between the representative's claim and the absentees' nor on the vigorousness of class counsel's advocacy of the absentees' interests. *Roper* v. *Consurve, Inc., supra,* 578 F.2d at 1111-12.

CONCLUSION

Amici respectfully suggest that the judgment of the Court of Appeals that the case is not moot should be affirmed.

Respectfully submitted,

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